(16,166.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 115.

THE HARTFORD FIRE INSURANCE COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript	1	1
Transcript from U. S. circuit court, northern district of Iowa	2	1
Caption to transcript	2	1
Transcript from district court of Jones county, Iowa	2	2
Petition	2	2
Notice of filing of suit and proof of service	5	5
Petition for removal to Federal court	7	7
Bond for removal	10	10
Order of removal	12	11
Clerk's certificate to transcript	13	12
Answer of defendant Chicago, Milwaukee and St. Paul Railway Co.	13	12
Amendment to answer of defendant Chicago, Milwaukee and St. Paul R'y Co.	14	13
Deed of lease, Chicago, Milwaukee and St. Paul R'y Co. to Simpson, McIntire & Company	15	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 12, 1897.

	Original.	Print.
Order: Leave to file amendment to answer	17	16
Demurrer to amendment to answer	18	16
Order of submission of demurrer to amendment to answer	19	17
Disclaimer of Simpson, McIntire & Company	19	18
Opinion on demurrer to amendment to answer	20	19
Order overruling demurrer to amendment to answer	29	26
Judgment	29	26
Petition for and order allowing writ of error	30	26
Assignment of errors	31	28
Bond on writ of error	33	29
Clerk's certificate to transcript	34	30
Writ of error and clerk's return	35	31
Citation and proof of service	37	32
Certificate of clerk that copy of writ of error is lodged in his office	38	34
Appearance of counsel for plaintiffs in error	40	34
Appearance of counsel for defendant in error	40	35
Argument commenced	41	35
Order: Cause submitted.	41	36
Opinion of U. S. circuit court of appeals	43	36
Judgment	52	45
Clerk's certificate to transcript	53	45
Stipulation as to return to writ of certiorari	54	46
Writ of certiorari	55	46
Clerk's return and certificate	57	47

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, begun and held at the city of St. Paul, Minnesota, in the eighth circuit, on the first Monday in May, it being the sixth day of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the eighth day of March, A. D. 1895, a transcript of record, pursuant to a writ of error to the circuit court of the United States for the northern district of Iowa, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Hartford Fire Insurance Company *et al.* were plaintiffs in error and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error; which said transcript of record is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } *ss*:
Northern District of Iowa, }

Pleas before the circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division, at a term begun and holden at Cedar Rapids, in said district, on the first Tuesday of April, A. D. 1893, before the Hon. O. P. Shiras, judge of the northern district of Iowa.

HARTFORD FIRE INS. COMPANY *et al.*, Plaintiff-,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*, Defendants. } No. 25. Law.

Be it remembered, that heretofore, to wit on the 15th day of July, A. D., 1893, a transcript from Jones county district court, in foregoing-entitled cause was filed in the office of the clerk of the circuit court of the United States, in and for the northern district of Iowa, Cedar Rapids division, in the words and figures following, to wit:

In the District Court of Iowa in and for Jones County, May Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire & Company, Defendants.

Petition.

Plaintiffs state:

That the Hartford Fire Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Connecticut, that the Springfield Fire and Marine Insurance Company is now and was at all times
2½ mentioned herein, a corporation duly organized and existing under the laws of the State of Massachusetts, that the Fire Association of Philadelphia, Pennsylvania, is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Pennsylvania; that the North British and Mercantile Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of Great Britian; that the Hanover Fire Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of New York; that the Citizens' Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of New York, and that the Dubuque Fire and Marine Insurance Company is now and was at all times mentioned herein, a corporation duly organized and existing under the laws of the State of Iowa, and that all said insurance companies above named were and now are transacting the business of fire insurance in the State of Iowa.

That G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, are now and were at all times mentioned herein copartners doing business at the city of Monticello, Jones county, Iowa, under the firm name and title of Simpson, McIntire and Company, having an office for the transaction of business at said Monticello, Iowa.

That on the 11th day of November, 1892 and for a long time prior thereto, said firm of Simpson, McIntire and Company was the owner of the following-described property, to wit: a cold-storage building and warehouse attached, situated on railroad ground on the east side of the railway track of the defendant, The Chicago, Milwaukee

& St. Paul Railway Company, in the city of Monticello, Jones county, Iowa and of a large and valuable stock of butter in cases and eggs in cases in said building.

That the defendant, The Chicago, Milwaukee & St. Paul Railway Company on the 11th day of November, 1892, and for a long time prior thereto and now is a corporation duly organized and existing under the laws of the State of Wisconsin, and was at all said times and now is the owner and in the possession of and using and operating a certain railroad or railway leading from the city of Davenport, in the State of Iowa, to a point known as Jackson Junction in the county of Winneshiek, State of Iowa, and running by and immediately upon the west side of the said property of the firm of Simpson, McIntire & Company, situated and described as aforesaid in the city of Monticello, Iowa.

3 And plaintiffs further say that on or about the 11th day of November, 1892, at or about the hour of 2.45 p. m., on said day, said defendant, in the operation of its said railway and while moving its engines and cars on its said railway track alongside the property of said Simpson, McIntire and Company, above described, negligently set fire to and destroyed by fire the said property of said Simpson, McIntire and Company, situated and described as aforesaid to the amount in value at the time and place aforesaid of the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88), being a loss and damage on said building in the sum of seven thousand dollars ($7,000) and upon the stock of butter in cases in said buildings, of nineteen thousand one hundred and eighteen dollars and eighty-eight cents ($19,118.88) and upon eggs in cases in said buildings of one thousand dollars ($1,000), whereby said firm of Simpson, McIntire and Company was damaged in the said sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88).

At the time said fire occurred, said Simpson, McIntire and Company had insurance against fire on said property by written and printed policies of insurance in each of the plaintiff's insurance companies and in the respective amount- hereinafter named, and after said losses and damage occurred, and prior to the commencement of this suit, said Simpson, McIntire and Company demanded and received payment from each of said insurance companies, plaintiffs, under their said policies of the respective amounts hereinafter stated, amounting in the aggregate to the sum of twenty-three thousand four hundred and fifty dollars ($23,450) an itemized statement of the names of said insurance companies and the amounts of each of said policies and the amounts paid and received thereon aforesaid being as follows, to wit:

Name of company.	Am't of policy.	Am't paid.
Hartford Fire Insurance Co.....	$10,000 00	$9,729 75
Niagara Fire Insurance Co.....	3,000 00	2,918 90
Springfield Fire & Marine Insurance Co...	3,000 00	2,918 90
Fire Association of Philadelphia, Pa.....	2,500 00	2,432 45
Fire Association of Philadelphia, Pa.....	1,000 00	890 00
North British & Mercantile Insurance Co..	2,500 00	2,225 00
Hanover Fire Insurance Company and Citizens' Insurance Company, under a joint (policu) known as the New York Underwriters' Agency.....	1,500 00	1,335 00
Dubuque Fire & Marine Insurance Co....	1,500 00	1,000 00

Plaintiffs aver that beside the above-named insurance paid and received, there was no other insurance on said property, and
4 that by reason of said payments by said insurance companies, each of said insurance companies became subrogated to all the right of the firm of Simpson, McIntire and Company against said defendant railway company on account of said loss and damage by fire, caused as aforesaid, to the amount of the payments made by each of said insurance companies respectively, to said firm of Simpson, McIntire and Company, amounting in the aggregate to the sum of twenty-three (—) four hundred and fifty dollars ($23,450).

Plaintiffs aver that the said firm of Simpson, McIntire and Company has an interest in the cause of action herein set forth equal to the difference between the whole amount of said loss and damage as aforesaid, and the aggregate amount paid said Simpson, McIntire and Company by said insurance companies aforesaid, and that Simpson, McIntire and Company refuse to join as plaintiffs herein and therefore are made defendants in this action.

Plaintiffs aver that due and legal demand has been made upon said railway company, defendant, by the plaintiffs for the amount of said loss and damage paid by them as aforesaid, prior to the commencement of this action, and that said defendant railway company has neglected and refused to pay the same or any part thereof.

Whereof the plaintiffs demand judgment against the said defendant railway company for the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88) with six per cent. interest thereon from the 11th day of November, 189?, together with the costs of this action.

R. W. BARGER,
THOMAS BATES, &
HERRICK & HICKS,
Attorneys for Pl'ffs.

STATE OF IOWA, } ss:
Jones County, }

I, R. W. Barger, being duly sworn, say that I am one of the attorneys for the plaintiffs in this action; that I (*ahev*) read the fore-

going petition and know what it contains, and that the matters therein stated are mainly in my personal knowledge, and true as I verily believe, and that those facts therein stated which are not within my personal knowledge, I say upon information and belief, are true as I verily believe.

R. W. BARGER.

Subscribed and sworn to before me by R. W. Barger, this 10th day of May, A. D. 1893.

——— ———,
Notary Public, Jones Co., Ia.

5 Indorsed: No. 2464. In the district c't. of Jones Co., Iowa, May term, 1893. Hartford Fire Insurance Company *et al.*, pl'ffs, *vs.* C., M. & St. P. R'y Co. *et al.*, def'ts. Petition. Filed with copy May 11, 1893. W. D. Sheean, clerk. Folio fee, $4.00. R. W. Barger, Thos. Bates and Herrick & Hicks, att'ys for pl'ff-.

In the District Court of Iowa in and for Jones County, May Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Defendants.

Original Notice.

To the Chicago, Milwaukee & St. Paul Railway Company, and to G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, copartners, doing business under the firm name and style of Simpson, McIntire and Company:

You are hereby notified that the petition of the plaintiffs in the above-entitled cause will be on file in the office of the clerk of the district court of Iowa, in and for Jones county, on or before the 12th day of May, 1893, claiming of you the sum of twenty-seven thousand one hundred and eighteen dollars and eighty-eight cents ($27,118.88) with interest thereon from the 11th day of November, 1892, on account of loss and damage by fire to the cold-storage building and warehouse attached, of said firm of Simpson, McIntire and Company, situated on the railroad grounds and immediately on the east side of said Chicago, Milwaukee and St. Paul Railway Company in the city of Monticello, Iowa, and to the stock of butter in cases and eggs in cases in said buildings, which said fire

was set out or caused by the Chicago, Milwaukee and St. Paul Railway Company in the operation of its said railway, on or about the 11th day of November, 1892, and at or about the hour of 2.45 p. m., on said day, the said insurance companies above named as plaintiffs having paid to the said firm of Simpson, McIntire and Company on account of said loss and damage by fire, the sum of twenty-three thousand four hundred and fifty dollars ($23,450) and
6 by such payments been subrogated to all the rights of said firm of Simpson, McIntire and Company against said defendant railway company to the amount so paid by said insurance companies to said firm of Simpson, McIntire and Company, on account of said loss and damage by fire aforesaid.

Said firm of Simpson, McIntire and Company having an interest in this cause of action and not joining in plaintiffs herein, are therefore made defendants. No personal judgment, however, is claimed against the said firm of Simpson, McIntire and Company.

Now, unless you appear thereto and defend on or before noon of the second day of the May term, A. D. 1893, of said court, which will commence and be holden at the court-house in the city of Anamosa, Jones county, Iowa, on the 22d day of May, A. D. 1893, default and judgment will be rendered against you.

R. W. BARGER,
THOMAS BATES,
HERRICK & HICKS,
Attorneys for Pl'ffs.

Constable's Return.

STATE OF IOWA, } ss:
Jones County, }

This notice came into my hands May 10th, 1893, and I certify that I served the same on the within-named defendants by reading the same to A. I. Jackson, general agent of the Chicago, Milwaukee & St. Paul Railway Company at Monticello, Iowa, and delivering to him personally a true copy of the same in Jones county, Iowa, on the 10th day of May, 1893, and by (readon-) the same to D. E. Pond, treasurer of Simpson, McIntire & Company at Monticello, Iowa, and delivering to him personally a true copy thereof in Jones Co., Iowa, on the 10th day of May, 1893.

W. J. YOUNG, *Constable.*

Subscribed and sworn to before me by W. J. Young, this 10th day of May, A. D. 1893.

E. H. HICKS,
Notary Public in & for Jones Co., Iowa.

Indorsed: No. 3464. Hartford Fire Ins. Co. *et al. vs.* Chicago, Milwaukee & St. Paul R'y Co. Original notice. Filed May 15, 1893. W. D. Sheean, clerk. Constable fees, $1.40. Paid by Barger. Barger, Bates, Herrick & Hicks.

7 In the District Court of Iowa within and for Jones County, May Term, A. D. 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire Insurance and Marine Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants, and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire & Company, Nominal Defendants.

Petition of C., M. & St. P. R'y Co. for Removal of Cause to United States Circuit Court.

To the honorable district court aforesaid:

Your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, the defendant above named, respectfully states and shows to this honorable court: That the above-entitled action is brought by the above-named plaintiffs in said district court of Iowa, within and for Jones county, to recover alleged damages in the (suȷ) of $27,118.88 with six per cent. interest from November 11th, 1892, and costs of suit on account of alleged loss and damage by fire to a certain cold-storage building and attached warehouse of said firm of Simpson, McIntire and Company (named as codefendants therein), situated on the railway grounds and immediately east of the railway track of this defendant, said Chicago, Milwaukee & St. Paul Railway Company, in the city of Monticello, in said Jones county, Iowa, and to a certain stock of butter and eggs in cases, in said building; which fire is alleged to have been set out or caused by this defendant, The Chicago, Milwaukee & St. Paul Railway Company, in and by the operation of its said railway, and on or about the 11th day of November, 1892. The said insurance companies, plaintiffs above named, claiming to have paid to said firm of Simpson, McIntire and Company on account of said alleged loss and damage by fire, the sum of $23,450, and by reason of (sȳch) payment claim to have been subrogated to all legal rights of said firm of Simpson, McIntire and Company against this defendant railway company, if any, and to the amount so alleged to have paid on account of alleged loss and damage by fire as aforesaid.

That said action is wholly of a civil nature, and that the matter and amount in dispute therein exceeds, exclusive of interests and costs, the sum or value of two thousand dollars.

8 That the controversy in said suit is wholly between citizens of different States. That your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, defendant therein, is a foreign corporation and was at the time of the commencement of

this suit, and still is, a non-resident of the State of Iowa, and was as (aforesaud) and is a corporation duly organized, created and existing under and by virtue of the laws of the State of Wisconsin, and a citizen of said State of Wisconsin, having its principal place of business in the city of Milwaukee, in said State of Wisconsin.

That the plaintiff, The Hartford Fire Insurance Company, was at the time of the commencement of this suit and still is, a corporation duly organized, created and existing under and by the laws of the State of Connecticut, and a citizen of said State of Connecticut; and that the plaintiff, Niagara Fire Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Springfield Fire and Marine Insurance Company at (thr) time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Massachusetts, and a citizen of said State of Massachusetts; and that the plaintiff, Fire Association of Philadelphia, Pennsylvania, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Pennsylvania, and a citizen of said State of Pennsylvania; and that the plaintiff, North British & Mercantile Insurance Company at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of *the* Great (Brit*ian*), and a citizen of said Great (Brit*ian*); and that the plaintiff, Hanover Fire Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Citizens' Insurance Company, of New York, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of New York, and a citizen of said State of New York; and that the plaintiff, Dubuque Fire & Marine Insurance Company, at the time of the commencement of this suit was, and still is, a corporation duly organized, created and existing under and by the laws of the State of Iowa, and a citizen of said State of Iowa.

9 That G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners doing business under the firm name of Simpson, McIntire & Company, named as codefendants with your petitioner in this action, were all at the time of the commencement of this suit, and still are, citizens and residents of said State of Iowa, and doing business as such copartners in the city of Monticello, in said Jones county, and State of Iowa.

Your petitioner further alleges and charges that said G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners under the firm name of Simpson, McIntire and Company, were not at the time of the commencement of this suit, and are not now, necessary

or (*por*per) parties defendant in and to this suit, or the alleged cause of action therein set up. That if they had, or have any legal interest whatever therein, the same was, and is, adverse to your petitioner, and as coplaintiff-, and not as codefendants, in said action. That their legal interest, if any, is joint with said plaintiffs in and to the alleged cause of action sued upon, and cannot be disunited or separated therefrom, and that plaintiffs in this suit expressly (*sek*k) and claim to recover also the entire alleged interest of said codefendants, and they make no claim of recovery against said codefendants or against any defendants except your petitioner.

And your petitioner avers and charged that its said codefendants, S. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, copartners, etc., were at the time of the commencement of this suit, and still are, merely nominal defendants, and not united in interest with this defendant in any manner, nor adverse to plaintiffs' interest, if any, and that they were made such codefendants for th- express and sole purpose of attempting thereby to defeat and prevent the legal right of your petitioner to remove said cause from said State court to the circuit court of the United States, all of which will more fully and at large appear by reference to the original petition now on file in this court and cause, which is hereby incorporated herein and expressly made a part hereof by direct reference, and will establish the allegations hereof.

That the time within which the defendant- *is* required by the laws of the State of Iowa, and the rules of this court to answer or plead to the petition in said action has not yet expired.

That your petitioner has made and herewith files a bond with good and sufficient security for its entering in the circuit court of the United States for the northern district of Iowa, Cedar Rapids division, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this hon. court to proceed no further herein except to accept this petition and said bond, and to make the order of removal required by law and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division, and it will ever pray.

MILLS AND KEELER,
Attorneys for Petitioner.

STATE OF IOWA, }
County of Linn, } *ss:*

I, Charles B. Keeler, being duly sworn, do say that I am one of the attorneys for The Chicago, Milwaukee & St. Paul Railway Company, the petitioner in the above-entitled cause; that I have read the foregoing petition, and know the contents thereof, and that the statements and allegat-ons therein contained are true, as I verily believe; that I am authorized to make and execute this petition on its behalf.

CHARLES B. KEELER.

Subscribed by said Charles B. Keeler in my presence and by him sworn to before me this 20th day of May, A. D. 1893.

[SEAL.] C. D. HARRISON,
Notary Public in and for Linn County, Iown.

Indorsed: No. 2464. In the district court of Jones county, Iowa. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* The Chi., Mil. & St. Paul R'y Co. *et al.*, defendants. Petition *for* C., M. & St. P. R'y Co. for removal to U. S. cir. ct. Tax copy fee, $2.50. Mills & Keeler, attorneys for def't R'y Co. Cedar Rapids, Iowa. C. D. J. 70. Filed May 23d, 1893, with copy. W. D. Sheean, clerk.

Bond.

Know all men by these presents: that the Chicago, Milwaukee & St. Paul Railway Company as principal, and A. T. Averill as surety, are held and firmly bound unto Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, (Pennsylvanie), North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New
11 York, Dubuque Fire & Marine Insurance Company, in the penal sum of one thousand (1,000) (dollard) for the payment whereof, well and truly to be made unto the said Hartford Fire Insurance Company, Niagara Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, their successors and assigns, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Chicago, Milwaukee & St. Paul Railway Company, having petitioned the district court of the State of Iowa, within and for Jones county, for the removal of a certain cause therein pending, wherein Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire & Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British & Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire & Marine Insurance Company, are plaintiffs, and The Chicago, Milwaukee & St. Paul Railway Company is defendant; to the circuit court of the United States in and for the northern district of Iowa, Cedar Rapids division.

Now, if the said Chicago, Milwaukee & St. Paul Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first d-y of the next session copies of all process, pleadings, record entries, depositions, testimony and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed

thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands and seals this 20th day of May, A. D. 1893.

THE CHICAGO, MILWAUKEE &
ST. PAUL R'Y COMPANY, [SEAL.]
By MILLS & KEELER. *Its Att'ys.*
A. T. AVERILL. [SEAL.]

STATE OF IOWA, } ss:
Linn County, }

I, A. T. Averill, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Iowa; that I am worth the sum of over five thousand dollars, beyond the amount of my debts; that
12 I have property in the State of Iowa and county of Linn liable to execution, equal to the sum of over five thousand dollars.

A. T. AVERILL.

Subscribed and sworn to before me this 20th day of May, A. D. 1893.

[SEAL.] NATHANIEL K. BEECHLEY,
Notary Public in and for Linn County, Iowa.

Indorsed: No. 2464. In the district court of Jones county, Iowa. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* C., M. & St. P. R'y Co. *et al.*, defendant-. Bond for removal to U. S. circuit court. Tax copy for $100. Mills & Keeler, attorneys for defendant-. Cedar Rapids, Iowa. Filed and approved May 23d, 1893. W. D. Sheean, clerk.

STATE OF IOWA, } ss:
Jones County, }

Be it remembered, that at a term of the district court of Iowa, holden in and for said county at the court-house in Anamosa therein, on the 31st day of May, A. D. 1893, were present the Honorable J. H. Preston, sole presiding judge of said court, W. A. Hogan, sheriff of said county, and W. D. Sheean, clerk of said court, when the following proceedings were had, done, and entered of record, to wit:

HARTFORD FIRE INSURANCE COMPANY *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants. } At Law.

Upon application cause is transferred to the United States circuit court for the northern district of Iowa, Cedar Rapids division, and clerk will certify up the record accordingly.

STATE OF IOWA, } ss:
Jones County, }

I, W. D. Sheean, clerk of the district court in and for said county, do hereby certify that the foregoing is a true and complete copy of

the record, and that the following papers herewith, to wit, petition and copy; original notice; petition of Chicago, Milwaukee and St. Paul Railway Company for removal to United States circuit court; and bond for same, are all of the papers filed in the case wherein Hartford Fire Insurance Company *et al.* are plaintiffs and The Chicago, Milwaukee & St. Paul Railway Company *et al.* are defendants, as the same appears of record in my office; I further certify that the following costs are due in this court:

13	W. D. Sheean, clerk, including copy of all papers.....	$9 50
	W. J. Young, constable, serving original notice.....	1 40
Plaintiffs' attorneys folio fees.		4 00
Mills & Keeler folio fees.....		3 50
Total		$18 40

In testimony whereof I hereunto set my hand and affix the seal of said district court at my office in Anamosa, Iowa, this 8th day of July, A. D. 1893.

[SEAL.] W. D. SHEEAN, *Clerk.*

Filed July 15th, 1893.

A. J. VAN DUZEE, *Clerk,*
By P. H. FRANCIS, *Deputy.*

And afterwards, to wit, on the 12th day of September, A. D. 1893, there was filed in the office of the clerk of said court in said cause, an answer of def't, which answer is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division, September Term, 1893.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Dubuque Fire and Marine Insurance Company, Citizens' Insurance Company of New York, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants, and G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Nominal Def'ts.

Answer of Chicago, Milwaukee & St. Paul Railway Company.

Comes now the defendant, The Chicago, Milwaukee & St. Paul Railway by Mills & Keeler, its attorneys, and for its answer to the plaintiffs' petition herein says:

It admits that at the times in said petition mentioned, the plaintiffs were, and still are insurance corporations as alleged, that this

defendant was and is a railway corporation operating a line of railway through the city of Monticello, Iowa, as alleged and that G. W. Simpson, D. I. McIntire, H. P. Harris and J. L. Hyde, were copartners doing business at Monticello, Iowa, under the firm name of Simpson, McIntire & Company.

14 But this defendant denies each and every other (allegations) in the said petition contained.

Wherefore, defendant prays for judgment for its costs herein.

MILLS & KEELER &
BURTON HANSEN,
Def't's Att'ys.

Indorsed: In the U. S. circuit court, northern district of Iowa, C. R. div. Hartford Fire Ins. Co. *et al.*, plaintiffs, *vs.* The C., M. & St. P. R'y Co., defendants. Answer of def't C., M. & St. P. R'y Co. Mills & Keeler, att'ys for def't R'y Co. Filed Sept. 12th, 1893. A. J. Van Duzee, clerk, by B. H. Francis, deputy.

And afterwards, to wit, on the 2d day of April, A. D. 1894, there was filed in the office of the clerk of the United States court in and for said district, an amended answer, which amended answer is in the words and figures following, to wit:

Amendment to Answer.

In the Circuit Court of the United States, Northern District Iowa, Cedar Rapids Division.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs, *et al.*,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Comes now the defendant railway company, by Mills & Keeler, its attorneys and, by leave of court amends its answer in this cause by adding thereto the following:

Count 11. And for its further and separate defense, this defendant says: That the premises upon which were situated the building and property alleged to have been destroyed by fire, were then, and still are, a part of the depot grounds and lands of and belonging to this defendant at said Monticello station in Jones county, Iowa; that the sole right and occupancy of said Simpson, McIntire & Company therein, was under and by virtue of a written lease, which

15 was executed on February first, 1890, by this defendant company to said Simpson, McIntire & Company, and under which they entered into and occupied said premises from and after

that date, said lease being in the words and figures following, to wit:

This indenture, made this first day of February, A. D. 1890, by and between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Simpson, McIntire & Co., of Boston, Mass., parties of the second part,

Witnesseth, that the said party of the first part does hereby lease, demise, and let unto the said parties of the second part, the following piece or parcel of land lying in the county of Jones, in the State of Iowa, and described as follows, to wit:

That part of the depot grounds of said railway company at Monticello, county and State aforesaid, as shown on a map on file in the office of said railway company, more particularly described as follows:

Beginning on the north line of Third street, 77 feet east from center line of main track of Farley branch; thence north at right angles to said street line 130 feet; thence east parallel to said street line 45 feet; thence south at right angles 130 feet to north line of Third street; thence west 45 feet to the place of beginning.

To hold, for the term of one year from the date hereof for the purpose of erecting and maintaining thereon a cold-storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars in advance, and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors and administrators, and assigns do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of any building or (building-) now on, or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property, remaining inside or outside of said buildings, by fire occasioned or originated by sparks, or burning coal from the locomotives, or from any damage done by trains, or cars running off the track or from the carelessness or negligence of employés or agents of said railway company; and further, that the said parties of the second part will in no way obstruct or interfere with the track of said railway company in using said premises.

And the parties of the second part agree to keep said premises in as good repair and condition as the same (ore) in at the commencement of said term; to pay, as the same become due and payable all (taxes) and assessments, general and special, that may be
16 levied or assessed thereon during the time they remain in possession thereof; and to quit and surrender said premises at the expiration of said term on demand of said railway company; and in case such demand shall not be made at the expiration of said term, to pay said rent at the rate and in the installments aforesaid, as long as they remain in possession thereof; and that they will not under-lease said premises without the written consent of said railway company.

And said parties of the second part further agree to quit and surrender said premises at any time before the expiration of said

first-mentioned term or at any time when default shall be made in the payment of said rent or taxes as aforesaid, within thirty days after demand of said railway company, and that upon the expiration of said thirty days, it shall be lawful for said railway company to expel them therefrom.

That parties of the second part may (and hereby agree, that they will, if said railway company shall so require) remove from said premises within thirty days after any termination of this lease all structures owned or placed thereon by them.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,
By P. M. MEYERS, *Secretary.*
SIMPSON, McINTIRE & CO.

In presence of—
S. H. CROLIUS AND
L. LODUE.
ANDREW NIMING.

Indorsed: 757. Short form. The Chicago, Milwaukee & St. Paul R'y Co. to Simpson, McIntire & Co., Monticello, Iowa. Lease dated Feb'y 1st, 1890. Expires Jan'y 31st, 1890. Rental $5.00 per annum. Ground for cold-storage warehouse. $5.00. Paid May 15, '90.

That from the first day of February, 1891, down to and including the time of said fire, Simpson, McIntire & Company remained in possession and occupancy of said premises under the terms and conditions of said original lease, and not otherwise; and were and continued to be tenants holding over under the lease aforesaid and subject to all its provisions.

And this defendant say- that as to the alleged destruction by fire of the building and property mentioned in plaintiffs' petition, all such risks, and the loss therefrom, were assumed by said Simpson,
McIntire & Company, and this defendant company was re-
17 leased therefrom as one of the express conditions of said lease and occupancy, and plaintiffs cannot now recover therefor.

Wherefore defendant prays judgment herein.

MILLS & KEELER,
Attorneys for Defendant.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Hinsey, being first duly sworn, on oath do depose and say, that I am an officer, to wit, the special agent of The Chicago, Milwaukee & St. Paul Railway Company, defendant herein, and as such am authorized to and do verify this answer on its behalf; that I have read the foregoing amendment to answer in the above-en-

titled cause, and know the contents thereof. and that the same are true as I verily believe.

JOHN A. HINSEY.

Subscribed and sworn to before me by the said John A. Hinsey on this 29th day of March, A. D. 1894.

[SEAL.] W. D. MILLARD,
Notary Public in and for Cook County, Illinois.

Indorsed: No. 25, law. In the U. S. circuit court, nor. dist. of Iowa, Cedar Rapids division. Hartford Fire Ins. Co. *et al.*, plaintiff-, *vs.* The Chicago, Milwaukee & St. Paul R'y Company (defencant). Amendment to answer. Mills & Keeler for defendant. Filed April 2d, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And afterwards, to wit, on the 3d day of April, A. D. 1894, the following proceedings were had in said cause, by said court and entered of record on page 108 of vol. 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY *et al.* } No. 25. Law.

Now on this 3d day of April, (A*L*D.) 1894, this cause coming before the court upon motion of defendant railway company for leave to file amendment to answer, and the (moti*ng*) being submitted to the court, leave is granted defendant to file said amendment to answer.

And on the 2d day of April, A. D. 1894, there was filed in the office of the clerk of said court in said cause, a demurrer to amendment to answer, which demurrer is in the words and figures following to wit:

18 In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division.

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*

Demurrer to Amendment to Answer.

The plaintiffs demur to the amendment to defendant's answer herein, being count 2 of the answer contained in said amendment, upon the following grounds:

1. The facts stated in said count do not amount to a defense, in that said count does not deny the facts charged in the petition and does not contain any matter or things in avoidance of plaintiffs' right of action herein.

2. Said count does not show that the fire complained of in the petition was set merely through the negligence of defendant or its employés. For (ough-) that appears from said answer the said fire may have been wilfully and criminally set by defendant and its employés.

3. Said count does not show that the lease therein pleaded was in force or effect at the time of the (firs) complained of in plaintiffs' petition, and does not show any agreement at that time on the part of Simpson, McIntire & Company, except to pay rent and taxes as specified in and by said lease.

4. The lease pleaded by defendant does not show any agreement to exempt defendant from liability for fires set by its locomotives in operating its lines of railway. Said lease does not show what locomotives are intended or referred to therein or thereby.

5. The agreement contained in said lease is too vague, indefinite and uncertain to exempt defendant from liability for the fire set out, as charged in plaintiffs' petition herein.

6. The agreement alleged to be contained in said lease and pleaded in the said second count, is contrary to public poli- and void, in that it seeks to exonerate defendant from liability for fires willfully or criminally set out by it as well as for fires set out by it through its own negligence or the negligence of its employés.

7. Said lease does not contain any release which in law is effective or sufficient to exonerate defendant from liability for the fire set out, as charged in plaintiffs' petition.

8. It is not alleged that plaintiffs or any of them had knowledge of the alleged agreement set out in the lease pleaded by
19 defendant in and by the said second count and without knowledge thereof the plaintiffs were not bound thereby.

Wherefore plaintiffs pray judgment.

R. W. BARGER,
CHAS. A. CLARK,
Att'ys for Plaintiffs.

Indorsed: Hartford Fire Insurance Co. *et al. vs.* Chicago, Milwaukee & St. Paul R'y Co. *et al.* Demurrer to amendment to answer. Filed April 2d, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy. R. W. Barger and Chas. A. Clark, att'ys for pl'ffs.

And on the 3d day of April, A. D, 1894, the following proceedings were had in said cause by said court, and entered of record on page 108 of vol. 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE CO. *et al.*
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *et al.*
} No. 25. Law.

Now on this 3d day of April, A. D. 1893, this cause coming before the court upon the demurrer of plaintiffs to defendants' amend-

ment to answer, the plaintiffs appearing by R. W. Barger, Esq., and Charles A. Clark, Esq., their attorneys, and the defendant railway company by Mills & Keeler, its attorneys, argument of counsel was heard and the demurrer was fully submitted to the court, and was by the court taken under advisement.

And afterward, to wit, on the 4th day of April, A. D. 1894, there was filed in the office of the clerk of said court in said cause, a disclaimer, which disclaimer is in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Cedar Rapids Division, April Term, 1894.

HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, Plaintiffs,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and G. W. Simpson, D. I. McIntire, H. P. Harris, and J. L. Hyde, Copartners, Doing Business under the Firm Name of Simpson, McIntire and Company, Defendants.

And now comes the above-named G. W. Simpson, D. I. McIntire, H. P. Harris, J. L. Hyde, copartners doing business under
20 the firm name of Simpson, McIntire and Company, and file their disclaimer herein, disclaiming any interest whatever in the above-entitled action, or of any right to recover any damages against said defendant, The Chicago, Milwaukee & St. Paul Railway Company in said action, and further state that they were made parties to this action without their knowledge or consent, and ask that this action be discontinued as against them, and that they be relieved from all costs therein.

Dated this 3rd day of April, A. D. 1884.

G. W. SIMPSON,
D. I. McINTIRE,
H. P. HARRIS,
J. L. HYDE,
Copartners, Doing Business under the Firm Name and Style of Simpson, McIntire & Co.,
By W. O. JOHNSON,
Att'y-in-fact.

Indorsed: No. 25. In U. S. circuit court, northern district of Iowa, Cedar Rapids division. Hartford Fire Ins. Co. *et al.*, pl'ffs, *vs.* The Chi., Mil. & St. Paul R'y Co., def't. Disclaimer of Simpson, McIntire & Co. Filed April 4, 1894. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And, afterwards, to wit, on the 11th day of September, A. D. 1894, there was filed in the office of the clerk of said court in said cause, an opinion of the court, which opinion is in the words and figures following, to wit:

In United States Circuit Court in and for the Northern District of Iowa, Cedar Rapids Division, Sept. Term, 1894.

HARTFORD FIRE INSURANCE COMPANY *et al.*
vs.
CHICAGO, MILWAUKEE & ST. PAUL R'Y COMPANY. } No. 25. Law.

Submitted on demurrer to answer.

Herrick & Hicks, C. A. Clark, R. W. Barger, for plaintiffs.
Mills & Keeler, for defendant.

SHIRAS, *District Judge:*

The questions presented by the demurrer to the answer in this cause (gro*n*) out of the following state of facts, as disclosed by the pleadings in the case.

21 On the first day of February, 1890, the defendant railway company executed a lease in writing to the firm of Simpson, McIntire & Co., of a named portion of its depot grounds at Monticello, Jones county, Iowa, for the term of one year, with the right to (e*x*ect) and maintain on the leased premises a cold-storage warehouse, "and upon the express condition, that the said railway company, its successors, and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability, or damage by reason of any injury to or destruction of any building or buildings, now on or which may hereafter be placed on said premises, of the fixtures appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coals from the locomotive or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company."

Simpson, McIntire & Co., as authorized in this lease, erected a cold-storage warehouse on the leased premises and continued in the occupation thereof until November 11th, 1892, when the building and contents were destroyed by fire, which fire, it is averred in the petition, was due to the negligence of the company in moving and operating its trains.

At the time of the fire Simpson, McIntire & Co., held insurance policies in the plaintiff companies upon the warehouse and its contents, consisting of butter and eggs, upon which policies the companies paid to Simpson, McIntire & Co., the aggregate sum of $27,118.88 which amount they now seek to recover against the defendant railway company as assignees of the rights of Simpson, Mc-

Intire & Co. As a defense to this claim, the railway company pleads the stipulation in the lease already cited and the plaintiff demur thereto on the ground that the exemption from liability sought to be secured by the conditions contained in the lease are void because contrary to public policy. This demur- was argued orally before me at the April term of this court and it then appeared that a case involving the question at issue was pending before the supreme court of Iowa; that upon the first hearing before that court, it had been held that such stipulation or conditions were void as against public policy, but upon a rehearing and reargument the court had held to the contrary, and had sustained the validity of the condition stipulating for exemption from liability and that a second petition for rehearing had been filed and was then pending before that court.

Under these circumstances final action on the demurrer was postponed, awaiting the decision of the supreme court of Iowa.

22 Since then the supreme court of Iowa has refused the petition for rehearing, thereby finally affirming the validity of an exemption from liability for fire negligently caused, such as is contained in the lease to Simpson, McIntire & Co.

Griswold *v.* Illinois Central R. R., 57 N. W. Rep., 843.

Counsel for the parties have now finally submitted the demurrer upon very full and able briefs. Upon behalf of the plaintiffs it is strenuously argued that this court is not bound by the ruling of the State supreme court upon question- involved but on the contrary that it is the duty of the court to exercise its independent judgment upon the question whether the condition contained in the lease is or is not valid.

Counsel for plaintiffs have presented in their brief citations from a large number of cases *described* by the Supreme Court of the United States which iterate and reiterate the rule that the courts of the United States are not bound by the decisions of State courts upon questions of general law, or upon questions arising out of matters committed by the Constitution to national control, or even upon the construction of State constitutions or statutes, when the question at issue is the effect of such constitution- and statutes upon pre-existing contracts.

But it does not seem to me that these cases reach the real point at issue upon this demurrer.

If the demurrer presented the legal question whether a contract which was in substance contrary to public policy, was enforceable in the courts of the country and it should appear that the supreme court of Iowa had held as a preposition of law, that the fact that the contract was contrary to public policy was not a bar to its enforcement through the aid of judicial process, this court would clearly not be bound by the decision of the State court. The effect upon the validity or enforceability of a contract of the fact that its provisions are admittedly contrary to public policy would be a question of general law, upon which this court must exercise its own judgment.

In fact, however, this court and the supreme court of Iowa, are in accord upon this question of general law, and in both forms it is held that a contract contrary to public policy is invalid.

The real question for consideration is, How shall it be determined whether the contract is or is not contrary to public policy? The subject-matter of the contract may be such that it affects the country at large or it may be local in its nature.

23 The nature of the subject-matter determined the sources from which light must be sought upon the question of fact whether the provisions of a given contract are or not contrary to public policy. In other words, there is a public policy, of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the National Government, and coextensive with the boundaries of the Union and also a State public policy, adapted to the circumstances of the locality embraced within the boundaries of the State, and applicable to all matters within State control.

Thus in Greenwood on Public Policy, it is said that any contract made by a competent party upon valuable consideration, is valid unless it binds the maker to do something opposed to the public policy of the State or nation.

Greenwood on Public Policy, page 1, rules 1 and 11.

In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the Constitution of the United States, the statutes enacted by Congress and the decision- of the courts, Federal and State, and in case there should be a divergence in the views of the Federal and State courts, upon a question of national public policy the conclusion reached in the Federal courts must be accepted as the best evidence of what the requirements of the national public policy are.

On the other hand, when seeking to determine the public policy of the State towards a subject within State control, the principal sources of information are State constitution, and statutes and the decisions of the courts, State and Federal, and in case of a divergence between them, the decisions of the State court must be accepted as the best evidence of the public policy of the State.

Vidal *v.* Girard's Executors, 2 How., 127–197.

Swan *v.* Swan, 21 Fed. Rep., 299.

Thus we are brought to the question whether the contract found in the lease to Simpson, McIntire & Co., deals with a subject-matter which falls within National or State control. On behalf of the defendant it is argued that the lease and the stipulations therein contained create or convey a title to real estate and thus form part of a subject-matter clearly within State control. I am not prepared to go to this extent in construing the subject-matter of the contract between the parties. The lease as a whole, creates and conveys a title to real estate and if the question at issue was one touching the title conveyed it would come within the rule, that the de-

24 cisions of the State courts, which constitute a rule of property, will be accepted and followed by the Federal courts.

The lease however in addition to its clauses creating and conveying a leasehold interest to Simpson, McIntire & Co., contains other provisions constituting a contract, not affecting the title to the realty, but dealing with the question of the liability for fire accidentally or negligently set out or caused in the operation of the railway of the defendant, a question apart from that of title to realty, wherein the decisions of the State court- become a rule of property.

On behalf of plaintiffs it is argued that the conditions in the lease affects the question of interstate commerce, a matter of national control, because cold-storage warehouses, adjacent to railways and the depots thereof, are needed to protect produce, like butter, when being gathered for shipment out of the State.

To a certain degree interstate commerce is dependent upon the erection and maintenance of proper warehouses for the reception and storage of the products of the country, but the fact that such buildings are so used does not place them beyond the power of the State. Thus it is clearly within the power of the State to direct the character of the buildings that may be built for storage purposes. As a protection against fire, the State may enact that elevators, depots, warehouses and the like shall be built of brick or iron and not of wood, and the power of the State in this respect be denied on the ground that such buildings are needed for and used in commerce between the States.

Neither is there force in the suggestion that the conditions contained in the lease pertain to the duties and obligations resting upon common carriers, engaged in interstate commerce.

There is nothing in the pleadings which shows that the property burned was used in connection with interstate commerce, but even if that was the fact, the conditions of the lease do not deal with the relations of common carrier, and the public, nor did these relations exist between the defendant and Simpson, McIntire & Co., with regard to the property destroyed by the fire which consumed the warehouse and its contents. The stipulation- in the lease so far as they affect this case, deal with the *dult* and obligation resting upon the defendant company growing out of the fact that the company in its business, used the dangerous agency of fire. The right to use the agencies of fire and steam in the movement of railway trains in Iowa, is derived from the legislation of the State and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire and to define the extent of the liability for fires resulting from the operations of trains by means of steam locomotives.

This is a matter within State control. The legislation of the State determines the width of the right of way used by the companies; the State may require the companies to keep the right of way free from combustible material; it may require the depot and other buildings used by the company to be of stone, brick or other like material, when built in cities or in close proximity to other buildings. The State, by legislation, may establish the extent of the liability of railway companies for damages, resulting from fires caused in the operation of the roads. When providing for acquisi-

tion or condemnation of the right of way, the State may declare the public uses to which the right of way may be subjected. Can there be any doubt that the State may empower the railway companies to contract with third parties for the erection of warehouses or elevators on the right of way to be used for the reception and storage of grain and other products, preparatory to shipment upon the railway, and that the State can define the extent of the liability of the railway companies for damages resulting to such property from fires caused by the operation of trains upon the railway. These considerations and others of like import which might be suggested, clearly show that it is a matter within State control to determine the extent of the liability for injury by fire resulting from the operation of railway trains under charters or authority granted by the State. Therefore when the question arises whether a given contract intended to define or limit the liability of a railway company, with respect to injury resulting from fires, is a valid or not, it must be solved by ascertaining what is the statute law or public policy of the State wherein the fire may have occurred. In the case now before the court, if the contract contained in the lease does not violate any of the provisions of the constitution of the State of Iowa, or is not contrary to any statute of the State or is not contrary to the public policy of the State as otherwise declared, it cannot be held invalid. It is not claimed that the contract contained in the lease violates any provision of the State constitution or statutes but it is averred that it is repugnant to public policy, as already shown, evidence of the public policy of a State is ordinarily to be sought in the constitution and statutes and judicial decisions of the State.

The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it clearly appears that there is a recognized or established public
26 policy touching the subject-matter which will be violated if the contract is enforced.

The burden is upon the plaintiffs in this case of showing that the contract in question is contrary to the public policy of the State of Iowa. No express provisions of the constitution or statutes of the State are cited as evidence of the public policy of the State and the only final decision of the supreme court of the State upon the question, holds that a contract such as is found in the lease to Simpson, McIntire & Co., is not contrary to the public policy of the State. Upon what theory can this court hold that the invalidity of the contract is established? Is this court justified in ignoring the decision of the supreme court of Iowa, as evidence of the public policy of the State? Clearly not.

But it is argued on behalf of the plaintiffs that the final decision of the supreme court of Iowa in the Griswold case should not be considered, because it was not rendered until after this contract was entered into and in fact not until after this suit was commenced.

The Supreme Court of the United States, in applying that provision of the Federal Constitution which declares that no State shall pass a law impairing the obligations of contracts, has uniformly *been* held, that the validity of a contract was to be deter-

mined by the laws in force at the date of the contract, whether evidenced by express statutes or by the decisions of the courts and that if thus tested, the contract was valid at its inception, it could not be rendered invalid by a subsequent change in the law of the State; whether that change was brought about by legislative enactment or by a difference in the decisions of the courts. This provision of the Constitution is intended to prevent the impairment of the obligation of contracts, valid when made, by a subsequent change in the law of the State, and the principle has no application to the case at bar. When the lease to Simpson, McIntire & Co. was executed in February, 1890, it had not been ruled or held in Iowa, that conditions such — are contained therein were contrary to public policy. It cannot be maintained that Simpson, McIntire & Co. were induced to execute the lease in reliance upon any decisions of the courts of Iowa that such conditions were invalid and void, and hence there has not been such a change in the State law evidenced by the decisions of its courts, as would bring the case within the provision of the Constitution of the United States.

In fact, the decision in the Griswold case instead of impairing the obligation of the contract entered into by Simpson, McIntire
27 & Co., sustains the validity thereof. Furthermore, even if it were true that at the time, the conditions therein contained limiting the liability of the railway company for damages caused by fire, were then in fact contrary to the public policy of the State, but the requirements of such public policy have since been changed by statutory enactment or by the divisions of the supreme court of the State, so that when the fire occurred in November, 1892, such exemption from liability was not contrary to public policy, would not such change in the law of the State have the effect of rendering the condition in the contract enforceable by judicial aid.

The final decision in the Griswold case shows that on the 30th day of April, 1890, more than two years before the fire happened in this case, the public policy of the State was not adverse to the validity of exemptions from liability such as are contracted for in the lease to Simpson, McIntire & Co.

In Eqell *v.* Daggs, 108 U. S. 143, this general question came before the Supreme Court in a suit for the foreclosure of a mortgage brought in the State of Texas. The defense was a plea of usury. It appeared that when the mortgage debt was contracted, a statute of the State of Texas declared all contracts for the payment of interest at a rate greater than twelve per cent. per annum to be void, but that the principal sum based without interest could be recovered. The note secured by the mortgage, included interest at the rate of twenty per cent. per annum, and therefore, under the statute in force at the date of the note the contract for interest was invalid.

Subsequently the State of Texas adopted a new constitution, which in terms repealed all usury laws without any saving clause as to existing contracts.

The Supreme Court held that the defense of usury could not be maintained, the general principle being stated as follows:

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever (-he) statute gives under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.

The benefit which he has received as the consideration of the contract, which contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been re-
28 peatedly announced and acted upon by this court. The right which the curative or repealing act takes away in such a case, is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provisions was ever designed to protect."

The rule applicable to cases of the character of that now before the court wherein a party seeks to evade the obligation of a contract to which he is a party, on the ground of public policy is, that the court will not lend its aid to enforce the contract, if at the time its aid is sought, the contract is contrary to the existing public policy. The court, in such case, refuses its aid for the enforcement of the contract, not because such is the right of either of the contracting parties, but because the public interests are adverse to the enforcement of the contract. If, however, at the time when the aid of the court is sought to enforce the terms of an existing contract the public interests do not demand that the court should refuse to aid in enforcing the contract according to its terms, the court would not be justified in (refusinf) its aid, simply because at some previous time, under the then existing laws and as circumstances then were, such aid would have been refused if then demanded.

Thus in the present case, the defendant asks the court to (enforve) in its favor the conditions of the contract existing between it and Simpson, McIntire & Co.

The plaintiff-, as assignees of the rights of Simpson, McIntire & Co., object to the enforcement of the terms of the contract on the ground that the same are contrary to the public policy of the State. To sustain this objection to the enforcement of the contract, it must appear that the contract is adverse to the now existing public policy of the State, for unless that be true, the court is not justified in refusing its aid for the enforcement of a contract which is confessedly good between the parties thereto.

Therefore, the inquiry is, What is the public policy of the State of Iowa upon the question of the right of railway companies to exempt themselves from liability for damages caused by fire under the circumstances pertaining to this case. No better evidence has been brought to the attention of the court upon this subject than that afforded by the decision of the supreme court of the State in the

Griswold case, and relying upon that decision I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire, is not now contrary to the public policy of the State of Iowa, and hence is not invalid.

29 The demurrer to the answer is therefore overruled.

Indorsed: Filed Sept. 11, A. D. 1894. A. J. Van Duzee, clerk.

And on the 11th day of September, A. D. 1894, the following proceedings were had in said cause, by said court, and entered of record on page 132 of volume 1 of the record of said court, to wit:

HARTFORD FIRE INSURANCE COMPANY *et al.* } No. 25.
vs. } Law.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. *et al.* }

Now on this 11th day of September, A. D. 1894, the above-entitled cause coming before the court upon the demurrer of plaintiff to amendment to answer,

The demurrer was fully submitted to the court, and the court being fully advised in the premises, overrules said demurrer.

Plaintiff excepts and elects to stand on the demurrer.

HARTFORD FIRE INSURANCE COMPANY *et al.* } No. 25.
vs. } Law.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. *et al.* }

Now on this 11th day of Sept., A. D. 1894, the above-entitled cause coming before the court upon motion of defendant for judgment for costs in said cause, plaintiffs electing to stand upon the rulings of the court and refused to plead further,

It is therefore ordered and adjudged by the court, that defendant, The Chicago, Milwaukee & St. Paul Railway Company, have and recover of and from the plaintiffs the costs of these proceedings, taxed at $256.25, and that execution issue therefor.

Plaintiffs except to judgment.

And afterwards, to wit, on the 20th day of February, A. D. 1895, there was filed in the office of the clerk of said court in said cause, a petition for writ of error, which is in the words and figures following, to wit:

30 In the United States Circuit Court, Northern District of Iowa, Cedar Rapids Division.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(*To*) To said court and the judges thereof:

Your petitioners, The Hartford Fire Insurance Company, Niagara

Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia (Pennsylvania), North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, respectfully state that at the September, 1894, term of said court, there was an action then and there pending wherein your petitioners wer- plaintiffs and The Chicago, Milwaukee & St. Paul Railway Company, was defendant, in which a judgment was then and there rendered and entered in favor of the said Chicago, Milwaukee and St. Paul Railway Company, against your petitioners, for the costs of said action. And your petitioners have filed therein in the office of the clerk of said United States circuit court, an assignment of errors in said action, as required by the rules of the United States circuit court of appeals, for the eighth circuit; and now here bring their bond in the sum of five hundred dollars with good and sufficient surety conditioned as required by law and the rules of said United States circuit court of appeals.

Wherefore your petitioners pray that a writ of error be granted in said action, directed to the judges of said circuit court of the United States, for the northern district of Iowa, Cedar Rapids division, commanding that the record in said cause be certified to said United States circuit court of appeals, and that a stay of proceedings be ordered until said writ of error shall have been determined.

THE HARTFORD FIRE INSURANCE COMPANY,
NIAGARA FIRE INSURANCE COMPANY,
SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA,
NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
31 HANOVER FIRE INSURANCE COMPANY,
(CIRIZENS') FIRE INSURANCE COMPANY OF NEW YORK,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
By R. W. BARGER AND
CHAS. A. CLARK, *Their Attorneys.*

Order.

A writ of error and supersedeas are hereby ordered and allowed as prayed for in the foregoing petition this 20th day of February, 1895.

O. P. SHIRAS,
Judge District Court.

Indorsed: The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Petition for writ of error and supersedeas. Filed (February) 20, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

And on the 20th day of February, A. D. 1895, there was filed in the office of the clerk of said court in said cause, an assignment of errors, which is in the words and figures following, to wit:

In the United States Circuit Court, Northern District of Iowa, Cedar Rapids Division.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA FIRE INSURANCE Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Assignment of Errors.

The Hartford Fire Insurance Company and other plaintiffs above named, respectfully aver and show that there is manifest error on the face of the record in the above-entitled cause in the following particulars, to wit:

1. The court erred in overruling plaintiffs' demurrer to the amendment to defendant's answer, being demurrer to count two of the answer, contained in said amendment and committed separate and distinct error in overruling said demurrer upon each of the following grounds:

a. The fact- stated in said count do not amount to a defense in that the said count does not deny the facts charged in the
32 petition, and does not contain any matter or thing in avoidance of plaintiffs' right of action herein.

b. Said count does not show that the fire complained of in the petition was set merely through the negligence of defendant or its employés. For aught that appears from said answer the said fire may have been (willfully) and criminally set by defendant and its employés.

c. Said count does not show that the lease therein pleaded was in force or effect at the time of the fire complained of in plaintiffs' petition, and does not show any agreement at that time on the part of Simpson, McIntire & Company, except to pay rent and (taxes) as specified in and by the said lease.

d. The lease pleaded by defendant does not show any agreement to exempt defendant from liability for fires set by its locomotives in operating its line of railway. Said lea-e does not show what locomotives are intended or referred to (therein) or thereby.

e. The agreement contained in said lease is too vague, indefinite

and uncertain to exempt defendant from liability for the fire set out as charged in plaintiffs' petition herein.

f. The agreement alleged to be contained in said lease and pleaded in the said second count, is contrary to public policy and void, in that it seeks to exonerate defendant from liability for fires (willfully) or criminally set out by it, as well as for fires set out by it through its own negligence or the negligence of its employés.

g. Said lease does not contain any release which in law is effective or sufficient to exonerate defendant from liability for the fire set out as charged in plaintiffs' petition.

h. It is not alleged that plaintiffs or any of them had knowledge of the alleged agreement set out in the lease pleaded by defendant in and by the (ssid) second count and without knowledge thereof the plaintiffs were bound thereby.

2. The court (erree) in rendering judgment in this action, upon the overruling of plaintiffs' said demurrer, in favor of the said defendant and against the plaintiffs.

R. W. BARGER,
CHAS. A. CLARK,
Attorneys for Plaintiffs.

Indorsed: The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Assignment of errors. Filed February 20th, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

33 And on the said 20th day of Feb., A. D. 1895, there was filed in the office of the clerk of said court in said cause, a bond, which bond is in the words and figures following, to wit:

Know all men by these presents that we, the Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, as principals and —— —— as surety are held and firmly bound unto the Chicago, Milwaukee and Saint Paul Railway Company, in the full and just sum of five hundred dollars, to be paid *by* the said Chicago, Milwaukee and Saint Paul Railway Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with (out) seals and dated this 20th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at the September term, A. D. 1894, of the circuit court of the United States for the Cedar Rapids division of the northern judicial district of Iowa, in a suit depending in said court, between The Hartford Fire Insurance Company and others, being the principals above named, plaintiffs, and The Chicago, Milwaukee & St. Paul Railway Company, defendant, judgment was rendered against the said Hartford Fire Insurance Company and others, the

principals, in this bond above named, and the said Hartford Fire Insurance Company and others, the said principals in this bond, have obtained a writ of error, of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Chicago, Milwaukee & St. Paul Railway Company, citing and admonishing it to appear in the United States circuit court of appeals for the eighth circuit, at the city of Saint Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Hartford Fire Insurance Company and others, the said principals in this bond, shall prosecute said writ of error to effect
34 and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

HARTFORD FIRE INSURANCE COMPANY,
NIAGARA FIRE INSURANCE COMPANY,
SPRINGFIELD FIRE AND (MARINE) INSURANCE COMPANY,
FIRE ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA,
NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
HANOVER FIRE INSURANCE COMPANY,
CITIZENS' INSURANCE COMPANY OF NEW YORK,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
DUBUQUE FIRE AND MARINE INSURANCE COMPANY,
By R. W. BARGER, *Their Attorney.*
A. R. WEST, *Surety.*

Approved by—
O. P. SHIRAS, *Dist. Judge.*

Indorsed: United States circuit court, Cedar Rapids division of the northern district of Iowa. The Hartford Fire Insurance Company *et al. vs.* The Chicago, Milwaukee & St. Paul R'y Co. Bond. Filed 20th day of February, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record and proceedings in the case of The Hartford Fire Insurance Company *et al.*, plaintiff-, *vs.* The Chicago, Milwaukee & St. Paul Rail-
35 way Company, defendant, No. 25 law, which are necessary to a hearing in the appellate court, as fully as the same remain on file and of record in my office.

Circuit Court U. S. Northern District of Iowa.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cedar Rapids, in said district, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk U. S. Courts, Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the Cedar Rapids division of northern district of Iowa, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1894, thereof, between The Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, plaintiffs, and The Chicago, Milwaukee & Saint Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Insurance Company of New York, Dubuque Fire and Marine Insurance Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit
36 court of appeals, for the eighth circuit, on or before the 21st day of April, 1895, to the end that the record and proceedings aforesaid being inspected, the United States court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of February, in the year of our Lord one thousand eight

Circuit Court U. S. Northern District of Iowa.

hundred and ninety-five. Issued at office, in the city of Cedar Rapids, with the seal of the circuit court of the United States for the

Cedar Rapids division of the northern district of Iowa, dated as aforesaid.

A. J. VAN DUZEE,
Clerk Circuit Court United States, Cedar Rapids Division of the Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

Allowed by—
O. P. SHIRAS, *Judge.*

Service of the above writ of error is hereby accepted this 4th day of March, 1895.

This writ come into my hands on the 4th day of March, A. D. 1895, and I certify that I personally served the same upon the within-named Chicago, Milwaukee and St. Paul Railway Company, by reading the same to M. P. Mills, one of the attorneys of record of the defendant in error, and by delivering to him a true copy of the same at Cedar Rapids, Linn county, Iowa, on the 4th day of March, A. D. 1895.

W. M. DESMOND,
U. S. Marshal of the Northern Dist. of Iowa,
By M. L. HEALY, *Deputy.*

Fees.

Service	$2 00
Copy	1 00
Mileage, 1	06
	$3 06

37 *Return to Writ.*

UNITED STATES OF AMERICA,
Cedar Rapids Division of the Northern District of Iowa, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Circuit Court U. S. Northern District of Iowa.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in city of Cedar Rapids, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk of said court,
By P. H. FRANCIS, *Deputy.*

No. —. United States circuit court, Cedar Rapids division of the northern district of Iowa. The Hartford Insurance Co. *et al. vs.* The Chicago, Milwaukee and Saint Paul Railway Co. Writ of error. To the circuit court of the United States for the Cedar Rapids division of the northern district of Iowa. Filed 4th day of March, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

United States of America to the Chicago, Milwaukee and Saint Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the northern district of Iowa, Cedar Rapids division, wherein The Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania, North British and (Mercantile) Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, Dubuque Fire and Marine Insurance Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of
38 error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of northern district of Iowa, this 20th day of February, 1895.

O. P. SHIRAS,
Judge of the United States District — Northern District of Iowa.

Service of the above citation is hereby accepted this — day of February, 1895.

THE CHICAGO, MILWAUKEE & SAINT PAUL RAILWAY COMPANY,
By —— ——, *Its Attorneys.*

The within citation came into my hands on the 4th day of March, A. D. 1895, and I certify that I personally served the same upon the within-named Chicago, Milwaukee and St. Paul Railway Company by reading the same to M. P. Mills, one of the att'ys of record of the defendant in error and by delivering to him a true copy of the same on the 4th day of March, A. D. 1895, at Cedar Rapids, Linn county, Iowa.

W. M. DESMOND,
U. S. Marshal of the Northern Dist. of Iowa,
By M. L. HEALY, *Deputy.*

Fees.

Service	$2 00
Copy	1 00
	$3 00

The Hartford Fire Insurance Co. *et al. vs.* The Chicago, Milwaukee and Saint Paul Railway Co. Citation. Filed March 4th, 1895. A. J. Van Duzee, clerk, by P. H. Francis, deputy.

UNITED STATES OF AMERICA, } ss.:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the circuit court of the United States in and for the northern district of Iowa, do hereby certify and return that the writ of error which is hereto attached, was served and filed in my office at Cedar Rapids on the 4th day of March, A. D. 1895, and a copy thereof at the same time lodged in my office, and

39 I now return said writ of error, and annexed hereto and hereto attached an authenticated copy of the record in the cause mentioned in said writ of error, and the following-named papers filed therein, to wit, the citation, and proof of service thereof.

Circuit Court U. S. Northern District of Iowa.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Cedar Rapids, in said district, this 7th day of March, A. D. 1895.

A. J. VAN DUZEE,
Clerk of U. S. Circuit Court, Northern District of Iowa,
By P. H. FRANCIS, *Deputy.*

Filed Mar. 8, 1895.

JOHN D. JORDAN, *Clerk.*

Hartford Ins. Co. *et al. vs.* C., M. & St. P. R'y Co. Transcript for C. C. app.

40 And on the thirteenth day of March, A. D. 1895, an appearance of counsel for plaintiff in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

HARTFORD FIRE INSURANCE CO. *et al.*, Plaintiffs in Error, }
vs. } No. 614.
CHICAGO, MILWAUKEE AND ST. PAUL R'Y CO. }

The clerk will enter my appearance as counsel for the plaintiffs in error.

CHAS. A. CLARK.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 614. Hartford Fire Insurance Co. *et al.*, pl'ffs in error, *vs.* C., M. & St. P. R'y Co. Appearance. Filed Mar. 13, 1895. John D. Jordan, clerk. Charles A. Clark, Cedar Rapids, Iowa, counsel for pl'ffs in error."

And on the twentieth day of April, A. D. 1895, an appearance of counsel for defendant in error was filed in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL R'Y CO. } No. 614.

The clerk will enter my appearance as counsel for the defendant in error.

CHARLES B. KEELER.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1895. No. 614. Hartford Fire Ins. Co. *et al.*, pl'ffs in error, *vs.* The C., M. & St. P. R'y Co. Appearance. Filed Apr. 20, 1895. John D. Jordan, clerk. Chas. B. Keeler, counsel for def't in error."

41 And on the fifth day of June, A. D. 1895, in the record of the proceedings of the United States circuit court of appeals, at the May term thereof, is an entry in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

WEDNESDAY, *June* 5, 1895.

THE HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, Defendant in Error. } No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Charles A. Clark in behalf of the plaintiffs in error, and the hour of adjournment having arrived before the conclusion thereof, further argument was postponed until tomorrow morning.

And on the sixth day of June, A. D. 1895, in the record of the proceedings of said United States circuit court of appeals, at the May term, 1895, thereof, is an entry of submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

THURSDAY, *June* 6, 1895.

THE HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, Defendant in Error.
No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause having been called this day for further hearing, argument was continued by Mr. Charles A. Clark in behalf of the
42 plaintiffs in error and by Mr. Charles B. Keeler for defendant in error, and concluded by Mr. R. W. Barger for plaintiffs in error. Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the seventh day of October, A. D. 1895, an opinion of said circuit court of appeals was filed in said cause in the following words, to wit:

43 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

HARTFORD FIRE INSURANCE COMPANY, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant in Error.
No. 614. In Error to the Circuit Court of the United States for the Northern District of Iowa.

Mr. Charles A. Clark and Mr. Richard W. Barger for plaintiffs in error.

Mr. Charles B. Keeler for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Statement.

On February 1, 1890, The Chicago, Milwaukee & St. Paul Railway Company, the defendant in error, leased to Simpson, McIntire & Company, a copartnership, certain portions of its depot grounds

at Monticello in the State of Iowa, "upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, (Simpson, McIntire & Company), for themselves and for their heirs, executors and administrators, and assigns do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of any building or buildings now on, or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains, or cars running off the track or from the carelessness or negligence of employees or agents of said railway company." Simpson, McIntire & Company had, or constructed, a cold-storage building and warehouse on the leased premises, stocked it with butter and eggs, and insured the buildings and stock with the Hartford Fire Insurance Company and seven other insurance companies, which are the plaintiffs in error, and the buildings and stock were burned. The insurance companies brought an action against the railway company in the court below, and alleged in their complaint that they had insured Simpson, McIntire & Company against loss by fire on their cold-storage building, warehouse and stock, that these were destroyed by a fire cause- by the negligence of the railway company on November 11, 1892, that the insurance companies had paid Simpson, McIntire & Company $23,450 on account of their loss by this fire, that they were thereby subrogated to the rights of Simpson, McIntire & Company against the railway company, and were entitled to recover from it that amount with interest. The railway company answered this complaint, and one of the defenses it pleaded was the condition of the lease to Simpson, McIntire & Company by which they exempted and released the railway company from all liability for damage to their buildings and stock caused by fire set by the railway company. The plaintiffs in error demurred to this defense on the ground that this stipulation of the lease was against public policy and void; their demurrer was overruled and judgment was rendered against them thereon. The writ of error in this case was sued out to reverse this judgment, and the ruling upon the demurrer is the error assigned.

SANBORN, J., after stating the facts as above, delivered the opinion of the court:

Is a condition in a lease by a railway company of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon caused by fire set by its locomotives or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case.

The public policy of a state or nation must be determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public. Vidal *v.* Girard's Executors, 2 How. 127, 197; United

States *v.* Trans-Missouri Freight Association, 7 C. C. A. 15, 73, 58 Fed Rep. 58; Swann *v.* Swann, 21 Fed. Rep. 299.

If this was a question of local law or of the public policy of the State of Iowa alone, it would require little consideration by this court. There are many provisions of the statutes of the State of Iowa relating to the duties of individuals and corporations to use care to prevent damage from fire. The two which bear most directly upon the question under consideration in this case are sections 1209 and 1308 of the Code of that State, which provide: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway," (McClain's Annotated Code of Iowa, 1888 sec. 1972); and "No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into." McClain's Annotated Code of Iowa, 1888, sec. 2007. In Griswold *v.* Illinois Central Railroad Co., 57 N. W. Rep. 839, the supreme court of Iowa considered these statutes and the public policy of that State, and, after repeated argument and the most careful deliberation, held that a provision in a lease by a railway company of a portion of its right of way, on which the lessee had placed an elevator and warehouse and personal property, which exempted the railroad company from liability for damages by fire negligently communicated by its servants to these buildings and their contents, violated no law of that State, was not injurious to the public interests, and was not against public policy. This was the decision of the highest judicial tribunal of that State. It constitutes an authoritative construction of the statutes of the State (Dempsey *v.* Township of Oswego, 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. Rep. 97; Rugan *v.* Sabin, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; Travelers' Insurance Co. *v.* Oswego Township, 7 C. C. A. 669, 674, 59 Fed. Rep. 58; Madden *v.* Lancaster County, 12 C. C. A, 566, 570, 65 Fed. Rep. 188), and a very persuasive authority that the contract here in question is not contrary to public policy.

Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent jurisdiction with those of the State, and while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment. Railroad Company *v.* Lockwood, 17 Wall. 357, 368; Myrick *v.* Michigan Central Railroad Company, 107 U. S. 102; Carpenter *v.* Providence Washington Ins. Co., 16 Peters 495, 511; Swift *v.* Tyson, 16 Peters 1; Railroad Company *v.* National Bank, 102 U. S. 14; Burgess *v.* Seligman, 107 U. S. 20, 33; Smith *v.* Alabama, 124 U. S. 465, 478; Bucher *v.* Cheshire Railroad Company, 125 U. S. 555, 583; Liverpool Steam Co. *v.* Phenix Insurance Co., 129 U. S. 397, 443.

We turn accordingly to the consideration of this question.

Before entering upon its discussion, it is important to note the terms and effect of the lease before us, and the situation of the parties, and of the property which was destroyed. Before the lease was made, the lessees had no right to enter upon, or to place any property upon, the leased premises, and the railway company owed to the lessees no duty to exercise ordinary care not to set fire
46 to any property on those premises, because presumptively there was none there, and because, if any one put any there, the only duty of the company was not willfully and wantonly to injure it, because it would be there in violation of law. If, however, the railway company should lease the right of way to Simpson, McIntire & Company, and should permit them to put buildings and personal property thereon, it would thereby subject itself to a new burden and assume a new duty—the duty of exercising ordinary care to prevent the burning of their property on these premises by the operation of its railroad. It was apparently willing to discharge all the duties it owed to the public and to every individual of the public, and it did not undertake, by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi-public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right of way to these lessees or to any one else, nor had they or any one, any right to the use of the leased premises before this lease was made. The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company; none of it was awaiting delivery by the company to its consignees after transportation; and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its position of a common carrier or by its character of a quasi-public corporation.

The question then is, was it a violation of public policy for the lessees to agree, under these circumstances, that if they were permitted to put their buildings and property upon the right of way of the railroad company, and to use them thereon, the duties and liabilities of the latter to them, and to the public, should remain as they were before the lease was made, and should not be increased by any additional burden? No act of Congress, no statute, no decision of any court (except a decision of the supreme court of Iowa, which was overruled by Griswold *v.* Illinois Central Railroad Company, *supra*,) which prohibits such an agreement or declares it to be against public policy has been called to our attention. Counsel for plaintiffs in error present a carefully prepared and exhaustive argument by analogy, to show that such an agreement is detrimental to the public welfare and against public policy, but their contention rests entirely upon that argument. If the analogy fails, the argument fails. The argument runs in this

way: A contract by a railroad company with one of its employees or with a passenger, or with a shipper, to exempt itself from liability for negligence in operating its railroad is against public policy and void (Kansas Pacific R'y Co. *v.* Peavy, 29 Kansas 169; Little Rock & Ft. Smith R'y Co. *v.* Eubanks, 48 Ark. 460; Railroad Company *v.* Lockwood, 17 Wall. 357; Express Company *v.* Caldwell, 21 Wall. 264, 267; York Company *v.* Central Railroad, 3 Wall. 107; Bank of Kentucky *v.* Adams Express Company, 93 U. S. 174, 181, 183, 185; Liverpool Steam Company *v.* Phenix Insurance Co., 129 U. S. 440, 441); the contract to exempt the railway company from liability for damage to the property of these lessees caused by fires resulting from the negligence of the railway company is similar to contracts with its employees, passengers and shippers to exempt it from liability to them for negligence in operating its railroad; therefore, the provision for exemption in this lease is against public policy and void. But the analogy fails in that vital part, which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens which are of the highest value to the State and Nation. A contract, which exempts the carrier from negligence in the discharge of these duties, is void because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission. In the former case public policy and the law impose upon the carrier the duty to hire employees, to operate its railroad with reasonable care in order to protect its employees from injury, and therefore it may not contract to be relieved from the law and the duty. The carrier has no choice. It must perform these duties or forfeit its charter. In the latter case no duty to lease is imposed. The company has the option—the choice to lease or to refuse to lease,—and if it does lease, and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission, that contract in no way relieves it from the discharge of any duty to the public or to any citizen that the law or public policy had imposed upon it.

47

Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost, and the latter with ordinary care. The passenger is often obliged to travel, and the shipper to send his goods, by railroad. In making their contracts they do not stand on an equal footing with it. They cannot stop to negotiate and settle

the terms of a contract, every time they desire to use the railroad. They would often prefer the abandonment of the contracts to such negotiations. On the other hand, the railroad company with its trained employees, and its monopoly of the transportation facilities sought, has the ability and the power to exact the contract it desires. This inequality in the situation of the parties, which would, if permitted, enable the railroad company to obtain unfair contracts from passengers and shippers, and the fact that contracts with them,
48 which exempt the company from liability for negligence, relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintain the rule that such contracts are against public policy. Railroad Company *v.* Lockwood, 17 Wall. 357, 369, 378, 379; York Company *v.* Central Railroad, 3 Wall. 107, 112; Express Company *v.* Kountze Brothers, 8 Wall. 342, 353; Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, 440, 443; Express Company *v.* Caldwell, 21 Wall. 264, 267, 268.

But the defendant in error and Simpson, McIntire & Company did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute, or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire set by the negligence of the company relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden, which it had the option to take or to refuse. Thus in the case at bar all the reasons for the rule avoiding contracts exempting common carriers from liability for negligence failed, and it is difficult to perceive how the proposition that this rule should govern this case can be successfully maintained.

It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to the consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that if it employed Simpson, McIntire & Company to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 133, 136. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Company to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from, any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid. It goes without saying that a railroad company could have legally employed an insurance company to indemnify it against loss by fire

occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had in effect insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid.

It is said that a statute which should provide that a railroad company should not be liable to the owner of property for damages to it by fire caused by the negligence of the company, would be
49 unconstitutional and void because it would authorize the taking of private property without due process of law and without compensation, and that therefore the contract here in question is void. But a statute enacting that a private individual who should construct a building or store personal property upon the right of way of a railroad company, should be deemed guilty of negligence and should not be permitted to maintain any action against the company for its destruction by fire occasioned by the negligence of the latter in the operation of its railroad, would not be obnoxious to this objection nor detrimental to the public interest, and it is not perceived how a contract to that effect could be.

The public policy of this nation with reference to contracts of common carriers exempting them from liability for negligence, was established and declared by the decisions of the Supreme Court in Railroad Company *v.* Lockwood, 17 Wall. 357, 384; Express Company *v.* Caldwell, 21 Wall. 264, 267, 268; and Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, 440, 441. In the leading case of Railroad Company *v.* Lockwood, 17 Wall. 357, 384, Mr. Justice Bradley declared the rules by which the validity of such contracts must be determined to be:

"First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

In Liverpool Steam Company *v.* Phenix Insurance Company, 129 U. S. 397, at page 441 Mr. Justice Gray thus states the rule in a single paragraph:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy are upheld; such as those exempting the carrier from responsibility for losses happening from accident or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. United States *v.* Trans-Missouri Freight Association, 7 C. C. A. 15, 82, 58 Fed. Rep. 58; Printing and Registering Company *v.* Sampson, L. R. 19 Eq. Cas. 462; Tallis *v.* Tallis, 1 El. & Bl. 391; Rousillon *v.* Rousillon, L. R. 14, Ch. Div. 351, 365; Stewart *v.* Transportation Company, 17 Minn. 372, 391; Marsh *v.* Russell, 66 N. Y. 288; Phippen *v.* Stickney, 3 Metc.
50 (Mass.) 384, 389. In our opinion the plaintiffs in error fall far short of sustaining this burden, and our conclusions are:

The reasons why an unreasonable and unjust contract between a common carrier and another exempting the former from liability for negligence is against public policy and void are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees.

A contract in a lease, by a railroad company, of a portion of its right of way, that it shall not be liable to the lessees for any damage caused by fire set, by the negligence of itself or of its employees, to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule and is not void because it does not fall within its reasons.

A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi-public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care after a lease containing such a contract is executed, that it would have been required to exercise, if no such agreement had been made. Express Company *v.* Caldwell, 21 Wall. 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or refuse to make the contract.

For these reasons the judgment below must be affirmed with costs, and it is so ordered.

CALDWELL, *J.*, dissenting:

I concur in the conclusion reached in this case but dissent from this statement in the majority opinion, namely: "Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law and not dependent solely upon any local statute or usage."

The contract referred to is a lease of real estate situated in Iowa. The lease was made and executed and its covenants were to be performed in that State. The supreme court of Iowa held the lease and all its conditions valid under the laws of that State. No de-

cision of the Supreme Court of the United States has been cited, and it is believed none can be found, holding that this decision of the supreme court of Iowa is not binding on this court. But however this may be, there is no difference of opinion between the supreme court of Iowa and this court as to the validity of the lease and all its conditions, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the decision of the supreme court of Iowa if the two courts differed in opinion on the question of public policy.

51 What is said on this subject is not necessary to the decision of the case; and moreover, is not law. A "local statute" declaring such a condition in a lease to be either valid or void would undoubtedly be obligatory on this and all other courts.

There are weighty reasons why a question of this character should not be lightly considered. The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding, and final. This unfortunate condition of our jurisprudence results from our dual system of government. It has no existence in any other country and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice or to a uniform and harmonious administration of the law than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a State court may be decided one way and a suit against the same party in the Federal court involving the very same question may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case.

It was the hope that this court would overrule the decision of the supreme court of Iowa in a similar case that caused the removal of this case into the circuit court. The class of questions as to which different rules of decision may obtain and the Federal courts may disregard the decision of the State courts thereon, has not been very clearly defined. What is said here has reference of course to non-Federal questions such as the one raised in this case. As to Federal questions there is but one rule of decision and one court of last resort.

The general statement has been often made that the Federal courts are not bound to follow the decisions of State courts on questions of general jurisprudence, when unaffected by State legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform or harmonious.

The question as presented by this record is not free from doubt. It is a question upon which the court should not express an opinion except when necessary to the decision of the case and that necessity does not exist in this case.

Filed October 7, 1895.

52 And on the seventh day of October, A. D. 1895, in the record of the proceedings of said United States circuit court of appeals, at the May term, 1895, thereof, is an entry of judgment in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *October* 7, 1895.

THE HARTFORD FIRE INSURANCE COMPANY, NIAGARA Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company, Plaintiffs in Error,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendant in Error. } No. 614.

In error to the circuit court of the United States for the northern district of Iowa.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Iowa, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Chicago, Milwaukee and St. Paul Railway Company have and recover against the Hartford Fire Insurance Company, Niagara Fire Insurance Company, Springfield Fire and Marine Insurance Company, Fire Association of Philadelphia, Pennsylvania; North British and Mercantile Insurance Company, Hanover Fire Insurance Company, Citizens' Fire Insurance Company of New York, and Dubuque Fire and Marine Insurance Company the sum of twenty dollars for its costs herein and have execution therefor.

October 7, 1895.

53 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing pages, from one to fifty-two, inclusive, contain a full, true, and complete copy of the transcript, pleadings, proceedings, and the opinion of said United States circuit court of appeals in a certain cause wherein The Hartford Fire Insurance Company *et al.* were plaintiffs in error and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error, No. 614, May term, 1895, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that on the fourteenth day of December, A. D.

1895, a mandate was issued in said cause and transmitted to the circuit court of the United States for the northern district of Iowa.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this thirtieth day of December, A. D. 1895.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

54 In the United States Circuit Court of Appeals, Eighth Circuit.

HARTFORD FIRE INSURANCE COMPANY *et al.*, Plaintiffs in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.
} No. 614. Stipulation.

It is hereby stipulated by and between the parties to the above-entitled cause that the certified transcript of the record in said cause, filed in the Supreme Court of the United States, with the petition of the plaintiffs in error for a writ of certiorari, shall be taken as a full and sufficient return to the writ of certiorari issued by the Supreme Court in this cause.

Dated at Chicago this 21st day of April, A. D. 1896.

CHARLES A. CLARKE AND
R. W. BARGER,
Counsel for Plaintiffs in Error.
CHARLES B. KEELER,
Counsel for Defendant in Error.

Endorsed: In the United States circuit court of appeals, 8th circuit. Hartford Fire Ins. Co. *et al.*, plaintiffs in error, *vs.* The Chicago, Milwaukee & St. Paul R'y Co., defendant in error. Stipulation. Filed Apr. 22, 1896. John D. Jordan, clerk. Charles A. Clarke and R. W. Barger, 809–810 Home Insurance building, Chicago, counsel for plaintiffs in error.

A true copy.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Hartford Fire Insurance Company *et al.* are plaintiffs in

error and The Chicago, Milwaukee & St. Paul Railway Company is defendant in error, No. 614, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
56 of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

57 *Return to Writ.*

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ and in accordance with the stipulation of counsel for the respective parties, I do hereby certify that the transcript of record in the case of The Hartford Fire Insurance Company *et al.*, plaintiffs in error, *vs.* The Chicago, Milwaukee and St. Paul Railway Company, filed with the petition for a writ of certiorari, is a full, true, and complete transcript of the record in said cause.

I further certify that the copy of the stipulation hereto attached is a true and complete copy of the stipulation above referred to.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Mo., in the eighth circuit, this 22nd day of April, A. D. 1896.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Supreme Court of the United States, October term, 1895. No. 876. The Hartford Fire Insurance Co. *et al. vs.* The Chicago, Milwaukee & St. Paul Railway Co. Writ of certiorari.

[Endorsed:] Case No. 16,166. Supreme Court U. S., October term, 1895. Term No., 115. The Hartford Fire Ins. Co. *et al.*, pl'ffs in error, *vs.* The Chicago, Milwaukee & St. P. R. R. Co. Writ of certiorari and return. Filed April 25, 1896.

No. [illegible]

[illegible]

[illegible]

[illegible]

THE [illegible]

[illegible]

THE [illegible]

[illegible]

On Petition for Rehearing from the Circuit Court of Appeals [illegible]

[illegible]

BRIEF FOR PETITIONERS.

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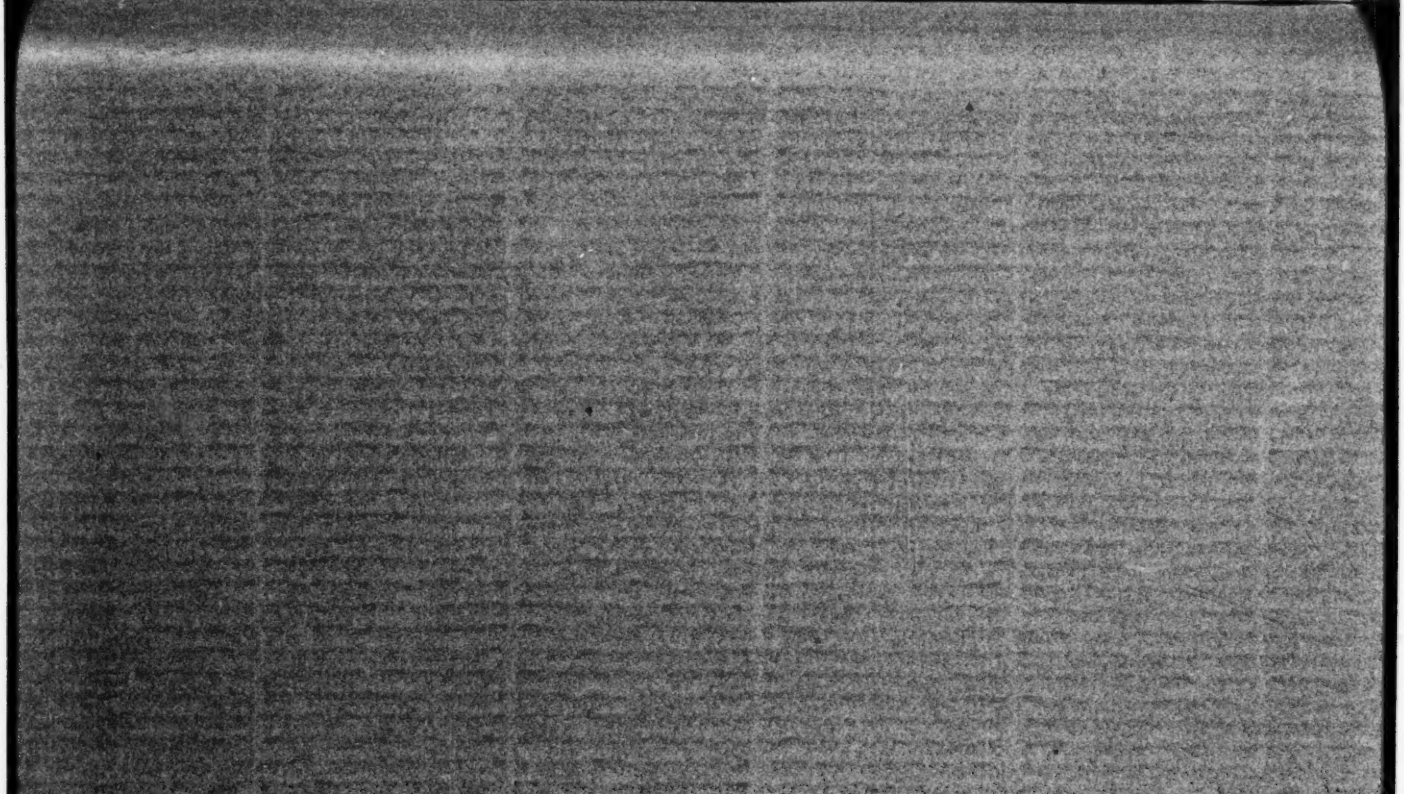

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO.....

THE HARTFORD FIRE INSURANCE COMPANY, ET AL.,

Plaintiffs in Error,

vs.

THE CHICAGO MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Defendant in Error.

BRIEF IN SUPPORT OF THE PETITION OF THE HARTFORD FIRE INSURANCE COMPANY, ET AL, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF FACTS.

The references are to the certified transcript of record in the Circuit Court of Appeals for the Eighth Circuit herewith submitted. Copies of the opinions in that Court are annexed to the petition herein as well as to the record itself.

February 1, 1890, Simpson, McIntire & Co entered into a contract of lease with the Chicago, Milwaukee & St. Paul Ry. Co. for a tract of ground, a portion of the station yards of the railway company at Monticello, Iowa, which lease contained the following clause:

"To hold, for the term of one year from the date hereof, for the purpose of erecting and maintaining thereon a cold storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars, in advance, and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and

persistently refuse to furnish the elevators for grain, and cold storage warehouses for perishable food products, which are absolutely requisite for receiving and transporting these classes of property which the railways hold themselves out as carriers of, and which constitute an enormous mass of commerce from which they derive a large part of their revenues.

By refusing to furnish such facilities, can the railway companies impose new burdens and risks upon the public and upon their patrons, by requiring them to submit to having their property, which is the subject of carriage and commerce, and the facilities for handling it, which they are compelled to furnish, destroyed by the negligence of the carrier in setting fire to it?

If the railway companies furnished these warehouses themselves, as is their duty to do in order that their patrons may have adequate facilities, they would then clearly fall within the rule laid down by an elementary writer. "But, if they combine the two characters, treating the deposit with them as being merely for the convenience of further carriage, or *to encourage or promote their business as common carriers*, they will be held to strict liability as such from the time of delivery to them. *In such cases the deposit is a mere accessary to the carriage, and for the purpose of facilitating it. The liability of the carrier begins with the receipt of the goods.*"

Hutchinson on Carriers, 2 Ed. by Mechem, Sec. 62.

The carrier could not, in such case, screen himself from liability for his negligent destruction by fire of the goods in his own warehouse. A railway company cannot do that in any case where goods are stored in its own warehouse. How then can a railway company compel its patrons to furnish the warehouses which it ought to furnish itself, and because they have done this, then compel them to submit to the risk of having not only the warehouses thus furnished, but the grain and perishable foods stored in them for carriage, destroyed by the negligence of it and its servants?

JUDICIAL NOTICE BY COURT.

That the railway companies, over a great area of country, do compel their patrons to furnish grain elevators and cold storage warehouses, is a matter of common observation and knowledge, and is witnessed by many decisions of courts of last resort. Thus, in Iowa, a railway which destroys one of these grain elevators by its negligence in setting fire thereto, is held liable to the owner of wheat stored therein by arrangement with the proprietor of the elevator.

In that case the Supreme Court of Iowa said: "While it is true, as claimed by appellant, that the court cannot take judicial notice of a custom to mix and mingle such property by warehousemen, yet *a court cannot ignore the fact that the grain elevators in this state cannot be operated in any other manner.* If the proprietor of an

elevator should be required to store each farmer's grain in a separate bin, and for failure to do so should be held liable for a loss of the grain by fire, the business of storing grain in elevators would practically cease."

Arthur vs. C., R. I. & P. Ry. Co., 61 Iowa, 648.

Numerous other cases in Iowa illustrate like questions which arise from the use of elevators built by third parties for receiving and shipping grain over railways.

Irons vs. Kentner, 51 Iowa, 90;
Johnson vs. Brown, 37 Iowa, 200;
Nelson vs. Brown, 44 Iowa, 455;
Marks vs. Cass County Elevator Co., 43 Ia., 146;
Cathcart vs. Snow, 64 Iowa, 584;
Sexton vs. Graham, 53 Iowa, 181;
Nelson vs. Brown & Doty, 53 Iowa, 555.

Undoubtedly the courts must take notice of this widespread condition of affairs, and of this method on the part of railway companies of compelling their patrons to furnish their own facilities. In a case where very similar questions were involved, it was said, by this court, opinion by Mr. Justice Blatchford:

"*We cannot close our eyes to the well known course of business in the country over very many of our railroads.* The contracts for transportation of goods are made, *not with the owners of the roads, nor with the railroad companies themselves*, but with transportation agencies, or companies which have arrangements with the railway companies for carriage. *In this manner some of the responsibilties of common carriers are often sought to be evaded, but in vain.* Public policy demands that the right of the owners to *absolute security against the negligence of the carrier, or of persons engaged in performing the carrier's duty*, should not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company."

Bank of Ky. vs. Adams Ex. Co., 93 U. S., 181.

Other decisions of this court are to the effect that it will take judicial notice of the wide spread course of business and trade involved in these practices by railway companies. Thus, it has been held that:

It will take notice of whatever is generally known within the limits of its jurisdiction.

Brown vs. Piper, 91 U. S., 37;
Phillips vs. Detroit, 111 U. S., 604;
King vs. Gallun, 109 U. S., 99;
Terhune vs. Phillips, 99 U. S., 592.

It will take judicial notice of the fact that it is the usual course

of trade to make advancements in New York upon the purchase of agricultural products in Ft. Wayne, Indiana, on the transfer of evidences of title, such as warehouse receipts. Such is

"*The usual course of the great inland commerce by which the larger part of the agricultural products of the valley of the Mississippi find their way to a market.* It has existed long enough to assume a regular form of dealing; and it embraces such a wide extent of territory, and is of such general importance that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them as it judicially recognizes the general and established usages of trade on the ocean."

Gibson vs. Stevens, 8 Howard, 399.

This language of Chief Justice Taney aptly describes the situation in the case at bar, and the widespread and general usage and custom involved in the questions which it presents for solution.

II.

IMPORTANCE OF QUESTIONS INVOLVED. UNCERTAINTY IN DECISIONS.

Obviously the questions involved are of great magnitude and importance; they will arise in many different jurisdictions, and will ultimately be presented for decision by most, if not all the Circuit Courts of Appeal.

That two cases should have arisen in Iowa on two different lines of railway, one presenting the case of an elevator, and the other of a cold storage warehouse, show how quickly the railways will generally adopt this device for screening themselves from liability for their own negligence, in dealing with an immense mass of commerce, brought upon their lines for shipment by the use of warehouse facilities, which it is clearly their duty to furnish for themselves.

The decisions, as they now stand, are in a state of grave uncertainty and doubt. The final decision of the Supreme Court of Iowa in the Griswold case was made, as appears from the reported decision, February 3, 1894, after this case was removed by defendant in error from the state into the federal court.

Griswold vs. Ill. Central Ry. Co., 57 N. W. Rep., 843.

The original decision in that case was made October 19, 1892, and held the condition in the lease exempting the railway company from liability for negligence, to be contrary to public policy, and void.

Griswold vs. Ill. Central Ry. Co., 53 N. W. Rep., 295.

No doubt, as suggested by Judge Caldwell (Record 51), it was to escape from this first decision of the Supreme Court of Iowa, that

the defendant in error removed this action into the Federal court. It seems clear, upon the authorities which will presently be cited in this brief, that under such circumstances the final decision of the Supreme Court of Iowa on the questions involved, is not controlling in the Federal courts.

But this is not all. The final decision in the Griswold case was by a divided court. Three of the judges, a bare majority, united in recalling and overruling the original decision, while two of the judges united in a dissenting opinion of great force, which it is submitted still sets forth the correct rule of law applicable to the questions involved. In this dissenting opinion it is said:

"Railway corporations are quasi public agencies and perform a public duty. They are agencies created by the state with certain privileges and subject to certain obligations. A contract that they will not discharge their obligations is a breach of public duty and cannot be enforced Ry. Co. vs. Ryan, 11 Kas., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void as against public policy. Thomas vs. R. R. Co., 101 U. S., 71. Among the obligations imposed upon a railway corporation, is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the dilligence and care with which it furnishes and operates its road is to that extent against public policy."

Then, speaking of the lease, it is said: "*It is clear that its purpose on the part of the defendant* (railway company) *was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement.* Elevators, coal sheds and lumber yards are important aids to a railway engaged in carrying grain, coal and lumber, in securing and transacting that branch of its business. * * * * In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided to the extent to which it patronized them."

Griswold vs. Ry. Co., 57 N. W. Rep., 847.

It was along this line of reasoning that the railway was originally held liable. Although overruled on the final decision by a bare majority of the court, the force and cogency of this reasoning is nonetheless undeniable.

CONFLICT OF OPINION AMONG FEDERAL JUDGES.

A like conflict of opinion will be found among the learned and distinguished judges who passed upon the questions involved in this case in the court below.

His Honor, Judge Shiras, who decided the case at circuit, held in his opinion on the demurrer, that he was bound by the final decision of the state court in the Griswold case; that even if a contract of this character when made would be invalid under the decisions of the state courts, but was valid by reason of a change in such decisions at the time it was sought to be enforced, the Federal courts would follow the last decision and enforce such contract; referring to the Griswold case, in the last sentence of his opinion, he says: "And, relying upon that decision, I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire is not NOW contrary to the public policy of the state of Iowa, and hence is not invalid." (Record 28).

In the Court of Appeals, Judge Caldwell refused to join in the affirmance of the judgment below, except upon the express ground that the Federal courts were bound by the decision in the Griswold case. As to the validity of the exemption in the lease as an original proposition, he said, in the last clause of his dissenting opinion: "*The question as presented by this record is not free from doubt* It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case." (Record 51).

Judges Sanborn and Thayer held that they were not bound by the decision in the Griswold case, but sustained the exemption from liability for negligence contained in the lease as the same was specially set up by the defendant in error. This conclusion was arrived at upon the ground substantially, that the defendant in error:

"Was apparently willing to discharge all the duties it owed to the public, and to every individual of the public, and it did not undertake by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right-of-way to these lessees or to anyone else, nor had they or any one any right to the use of the leased premises before this lease was made." (Record, 46.)

"But the law imposes no duty upon a railroad company to lease its right of way or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission." (Record, 47.)

"But the defendant in error and Simpson, McIntire & Co. did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire, set by the negligence of the company, relieved the company from no duty it was required by law to perform, but simply provided that it should not

assume an additional burden which it had the option to take or to refuse." (Record, 48.)

"There is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Co. to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid." (Record, 48.)

It is respectfully submitted that this line of reasoning does not dispose of the real questions involved. A railway company having failed to furnish needed stational facilities in the form of warehouses and elevators, and having thus compelled its patrons to furnish them under what is in form a lease, but in reality a mere license, should hardly be permitted to deny that it was either bound to furnish them for itself, or through its patrons and the public.

Neither do its patrons stand upon an equal footing with the railway company. While it is true that the company has no monopoly of land in Iowa, yet a warehouse or elevator, in order to furnish the requisite facilities and conveniences to the public which the railway company ought to furnish, must be located upon the right-of-way of the railway company, or so nearly adjacent thereto that it may be reached by a spur track or side track. Now if a patron should erect such a warehouse or elevator upon his own ground immediately adjoining the station grounds of the railway, the latter might still refuse to build or even operate a spur track or side track with reference to such elevator or warehouse, unless it was exempted from liability for burning the same and its contents by negligence, by a provision in a contract precisely similar to that inserted in the lease in controversy.

Thus it will be seen that the patrons of railways have no real freedom of choice in these matters. They must have elevators and cold storage warehouses somewhere in order to carry on a vast volume of commerce over the railways. These facilities when furnished by themselves will still be of no practical use or benefit unless the railway tracks are laid down to and past them. The railways may refuse such tracks unless exempted from liability for their own negligence in operating them. Wherever, therefore, the patron builds these warehouses, whether on his own grounds or on the grounds of the railway company, he may still be compelled to submit to the conditions contained in these leases, or he cannot secure side tracks from any common carrier or any railway company anywhere. What freedom of choice has the shipper or the public in dealing with railway companies under such circumstances?

How can it fairly be said that this course of proceeding has "relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden which it had the option to take or refuse." In reason and justice it

should not have the option to take or refuse the responsibility of furnishing these stational facilities in some form; nor of being exempt from liability for negligence and carelessness in destroying them and their contents after refusing to furnish them itself.

If, as held by the Court of Appeals, the railway company may employ others to furnish warehouses and elevators, and stipulate that such others shall hold the companies harmless from any damage to such property and contents, from fires caused by the negligent operation of the railroad, then all that a company will need to do, will be to have some pecuniarily irresponsible employe furnish warehouses in form, which it may build itself in fact, and thus escape from all duty and obligation to exercise diligence not to destroy the property of its patrons therein for shipment, or for delivery to a consignee.

These questions are of such manifest magnitude and importance to all shippers by railway everywhere, that it is respectfully submitted they should receive a more authoritative solution and determination than can be gathered from the conflicting decisions of the Supreme Court of Iowa, and the conflict in opinion among the very able and learned judges who took part in the decisions of this cause in the courts below.

III.

DECISION OF COURT OF APPEALS NOT IN HARMONY WITH DECISIONS OF THIS COURT.

It is, perhaps, too much to say that the decision of the Court of Appeals is in conflict with the decisions of this court. The precise questions now involved have not been decided or passed upon here. Indeed, they are practically new questions.

But it is submitted that the decision below is not consistent, nor in harmony with the decisions of this court upon questions of substantially the same character. This court has repeatedly held that it is contrary to public policy to allow railway companies to stipulate for exemption from injuries or destruction of property caused by their own negligence, even in cases where decisions of the courts of the states in which the contracts were made held such exemptions valid.

R. R. Co. vs. Lockwood, 17 Wallace, 357;
Express Co. vs. Caldwell, 21 Wallace, 264;
Liverpool Steam Co. vs. Phenix Co., 129 U. S., 397;
York Co. vs. Central R. R., 3 Wallace, 107;
Express Co. vs. Kountz Bros., 8 Wallace, 342;
Hart vs. Pa. Ry. Co., 112 U. S., 338.

It is true that a railway company may make a valid stipulation that it shall be entitled to the benefit of any insurance which there may be upon property transported by it, and which is destroyed by its own negligence.

Providence Ins. Co. vs. Morse, 150 U. S., 99;
Phoenix Ins. Co. vs. Western Transportation Co., 117 U. S., 312.

But a railway company cannot make a valid stipulation which will *compel a shipper* to secure such insurance for its benefit, and thus indemnify itself against its own carelessness at the shipper's expense.

"The question raised is, will the courts compel the performance of a contract between shipper and carrier *requiring the shipper to protect the carrier against the consequences of its own negligence?* There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose; but the question here presented is, *can he compel the shipper to insure the goods for his benefit?* If so, he can compel the shipper to release him entirely and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employes. *This in the language of the English courts would be unjust and unreasonable. In the language of our own cases it would be contrary to public policy.*"

Willock vs. Pa. Ry. Co., 166 Pa. St., 192.

The decisions of this court are clearly to the effect that no general release in advance, of liability for tortious acts which may occur in the future, is valid or will be upheld.

Ins. Co. vs. Morse, 29 Wallace, 451;
Teal vs. Walker, 111 U. S., 252.

It is believed that the result of this line of decisions must be to hold the exemption relied upon by the defendant in error to be unreasonable, contrary to public policy, and void.

IV.

FEDERAL COURTS NOT BOUND BY DECISION IN GRISWOLD CASE.

It is well settled that where the jurisdiction of the Federal courts has already been invoked in a pending litigation, those courts are not bound by any decisions of the state courts made during the pendency of such litigation.

Burgess vs. Seligman, 107 U. S., 20;
Clark vs. Bever, 139 U. S., 116;
Carroll County vs. Smith, 111 U. S., 562.

And it is also true as to rights which accrued before the decisions of the state courts, and as to all questions of general jurisprudence as contra-distinguished from strictly local law, that the Federal courts are not bound by the decisions of the state courts.

Anderson vs. Santa Anna, 116 U. S., 365;
Bowles vs. Brimfield, 120 U. S., 762;
Ry. Co. vs. Doe, 114 U. S., 352;
Liverpool Co. vs. Phenix Co., 129 U. S., 443;
Ry. Co. vs. Lockwood, 17 Wallace, 368;
Delmas vs. Insurance Co., 14 Wallace, 667.

And see also decisions cited in opinion of Court of Appeals on this question, Record p. 45.

Federal courts will not follow a decision of state courts holding an attempted exemption of a telegraph company from liability for its negligence, to be valid.

Western Union Tel. Co. vs. Cook, 9 C. C. A., 684.

No doubt, as suggested by Judge Caldwell in his opinion, "It was the hope that this court would overrule the decisions of the Supreme Court of Iowa in a similar case that caused the removal of this case into the circuit court," *by the defendant in error*. In other words, the defendant in error was then seeking to escape from the first decision of the Iowa Supreme Court in the Griswold case, and it cannot now invoke as binding upon the Federal courts, the final decision in that case, made while this litigation was pending in the tribunal into which it had removed it.

V.

ATTEMPTS TO EXEMPT FROM LIABILITY FOR NEGLIGENCE GENERALLY HELD CONTRARY TO PUBLIC POLICY AND VOID.

Telegraph companies are not common carriers, but cannot by contract exempt themselves from liability for their own negligence.

Western Union Tel. Co. vs. Cook, 9 C. C. A., 684;
Adams Ex. Co. vs. Caldwell, 21 Wallace, 269;
Grinnell vs. Western Union Tel. Co., 113 Mass., 301;
Thompson vs. Tel. Co., 64 Wis., 531;
Harkness vs. Tel. Co., 73 Ia., 190;
Smith vs. Western Union Co., (Ky.), 8 A. & E. Corp. cases, 13.

Judge Gresham at circuit applied the same doctrine to a contract between a private employer and his servant.

Roesner vs. Herman, 10 Biss., 486.

And railway companies may not contract for the right to injure their servants through negligence.

K. P. Ry. Co. vs. Keely, 29 Kas., 169;
Little Rock Ry. Co. vs. Eubanks, 48 Ark., 460;

Ry. Co. vs. Spangler, 44 Ohio St., 476.

Sleeping and parlor car companies are not liable as common carriers nor as innkeepers, yet they must exercise due diligence in protecting both passengers and their property.

Hutchinson on Carriers, 2 Ed. by Mechem, Sec. 1617 d. to 1618 k., and authorities there cited.

A railway company cannot contract for exemption from liability for a personal injury inflicted through its negligence upon one employed by an independent contractor engaged in building its line of road.

Johnson vs. Ry. Co. (Va.) 11 S. E. Rep., 829.

Public policy should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

Cooley on Torts, 687;
Bishop on Non-Contract Law, p. 1074;
Bishop on Contracts, Sec. 549.

PUBLIC POLICY AS TO FIRES GENERALLY.

Aside from the immediate duty which railway companies owe to their patrons not to destroy their property in the form of warehouses which they are compelled to build for themselves, or goods whether in transit or in process of being placed in transit, or stored in warehouses after the shipment is completed, there is a uniform and universal public policy against permitting the negligent setting out and escape of fires.

No agency is more dangerous. To set fire to warehouses at railway stations is frequently to imperil many lives, and the property of entire communities.

Throughout the entire land will be found a code of laws and police regulations establishing paid fire companies, or authorizing volunteer fire companies, and taxing cities and towns for water works, the better to fight and repress this dangerous agency.

Are all safeguards of this character to be nullified by authorizing contracts which reserve the right to negligently set fire to business property in business communities?

If a railway company may reserve this right, a manufacturing company may reserve or acquire it as to adjacent property. So electric light companies may reserve the right to set fire to and burn up whole cities or towns by the negligent and careless use of electricity.

Railways are especially subject to police regulations against fires.

M. & St. L. Ry. Co. vs. Terry, 127 U. S., 210;
Northern Pacific Ry. Co. vs. Mackey, 127 U. S., 205.

If a state were to contract with a railway company that it might

build a line of railway through its borders with no liability for fires negligently set out by it, such contract would undoubtedly be void. At any rate, it might be repudiated at any time by the legislature by laws passed in the exercise of the police power, entailing a liability for such negligence, in order to protect the public "in particulars essential to the preservation of the community from injury."

N. Y. & N. E. Ry. Co. vs. Bristol, 151 U. S., 567.

The statutes of Iowa make railway companies "liable for all damages by fire that is set out or caused by the operation of any such railway."

Code of Iowa, Sec. 1972.

The railway companies are liable for all fires set by them unless they can prove affirmatively the almost impossible thing that they were guilty of no negligence causing or contributing to such fires.

"The presumptions of the case devolve upon the defendant the burden of showing the negative of such facts, or at least, to negative the inference of negligence arising therefrom. It may be thought that the rule *devolves upon railway companies nearly, if not quite, an impossibility of proof in such cases, but that fact cannot change the result.*"

Greenfield vs. C. & N. W. Ry. Co., 83 Ia., 274;
Small vs. Ry. Co., 50 Ia., 338.

In such cases contributory negligence is no defense, nor is it necessary to charge or prove negligence on the part of the railway company in order to recover, if the fire is actually set by it.

West vs. Ry. Co., 77 Iowa, 655;
Engle vs. Ry. Co., 77 Iowa, 661;
Babcock vs. Ry. Co., 62 Iowa, 513.

In addition to this the statutes of Iowa, as elsewhere, bristle with legislation designed to protect the public against the setting out or spread of fires. It is unnecessary to quote these statutes, they exist everywhere in nearly the same form and establish a universal public policy for the protection of the public against fires.

The contract assailed in this litigation tends to defeat this public policy by reserving the right to set out fires negligently and by offering a premium to this extent for starting conflagrations, the destructive effect of which nobody can foresee or guard against.

In any view of the case it is respectfully submitted that the exemption from liability put into its lease by defendant in error, is contrary to public policy and void, and that the writ of certiorari ought to issue as prayed.

R. W. BARGER
CHAS. A. CLARK,
Attorneys for Petitioners.

CHAS. A. CLARK,
Of Counsel.

No. 876 295 145

Reply Brief of Barger & Clarke for

IN THE

Filed Mar. 9, 1896.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

876

HARTFORD FIRE INSURANCE COMPANY ET AL.,
Plaintiffs in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

On Petition of Plaintiffs in Error for writ of Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

R. W. BARGER,
CHARLES A. CLARKE,
ATTORNEYS FOR PETITIONERS.

BARGER & MOLONY, PRINTERS.

IN THE

Supreme Court of the United States,

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HARTFORD FIRE INSURANCE COMPANY et al.,
Plaintiffs in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

On Petition of Plaintiffs in Error for writ of *Certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

Can a railroad company make a contract *in presenti* to protect itself against its future wrongful acts, and thus in advance abrogate a future right which the law casts on every person before the right really comes into being? If so, then one may insert in a promissory note an agreement that he will not assert the statute of limitations after the note is barred by that statute.

If one goes on to a railroad's right of way, without its permission, is there no duty on the railroad company not needlessly or intentionally to injure such person?

If such person comes on by permission, is not the railway in duty bound, not by its negligence, slight, great, wilful or wanton to injure such person?

If under an enlightened jurisprudence public policy imposes

the duty on the railway not thus by slight, great, wilful or wanton negligence to injure such person, is not a contract permitting the railway thus to injure him contrary to such duty, and is not the tendency of such a contract contrary to the high degree of care which the law requires of railways in regard to setting fires?

The law, though uncertainly laid down in the case at bar up to this point in this litigation, holds that such a contract is not contrary to public policy, and its tendency is not inimical to the public interest.

The Iowa Supreme court, composed of five judges, first held unanimously that such a contract was invalid. Under the combined influence of all the railroads passing through that state, a rehearing was procured, and three of the judges were induced to change, without any explanation, their former holding.

Griswold v. *I. C. R. R.*, 53 N. W. Rep., 295.
Griswold v. *I. C. R. R.*, 57 N. W. Rep., 843.

Judge SHIRAS in the case at bar, understanding that he was bound to follow the Iowa Supreme Court on this question whether in his opinion such court was right or wrong, first continued this cause on his own motion awaiting the final action of that court on a second petition for rehearing, and when the second petition was overruled, filed his opinion in this case, holding such a contract valid (not because such was his opinion of the law) but, because three of the Iowa judges, without explanation, reason or authority, had changed their former holding, and Judge Shiras considered himself, as a federal judge sitting in Iowa, technically bound by their decision even though as matter of fact it did not agree with his personal opinion of the law. Judge Caldwell in the Appellate court concurred in the conclusion there reached that such a contract

was valid, because, as he said, the Federal court sitting in Iowa was bound to follow the uncertain opinion of the three state judges. Judges Sanborn and Thayer disagreed with both him and Judge Shiras on this point, but held on principle that such a contract was valid. Thus we have two of the judges in the Iowa Supreme court, *upon authority*, in an able opinion holding such a contract invalid. It is fair, we think, to place Judge Shiras in company with these and possibly Judge Caldwell, making four of the able judges who have passed on the question in favor of the invalidity of the contract, and five, a bare majority of one, in favor of its validity.

The railway acquired its right of way under the law of eminent domain, for the purpose of constructing and operating a railroad. Whenever it attempted to devote the land thus acquired to other purposes for private gain this amounted to a sequestration and that moment it lost all right in the land and the lease failed for want of title. If this is not true it is because the railway, as a common carrier, had the right to devote the land so acquired to purposes incidental and necessary to the operation of the road. If this is true then it entered into the lease in its capacity as a common carrier and therein sought to protect itself against its own negligence as a common carrier, which, it is conceded, it could not do under all the authorities. By permitting others to come on its right of way and do for it those things which are necessary or incidental to its business as a common carrier it cannot thus relieve itself from the duty of care which would otherwise attach to it. It made this lease in order to increase its facilties as a common carrier and to promote its business as such, otherwise it had no right to make it. See quotation from Judge Robinson's opinion, former brief, page 7.

In the opinion of the Appellate court, it is said: "But the defendant in error and Simpson, McIntire & Co., did not

stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees, caused by fire, set by the negligence of the company, relieved the company from no duty it was required by law to perform, but simply provided that it should not assume additional burden, which it had the option to take or to refuse." (Rec., 48.)

A railway company and a contractor to remove a hill from its right of way do not stand on unequal footing, and yet it was held in such a case under a contract presenting this same question (*Johnson* v. *Ry.*, 11 S. E. Rep., 829), that "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly, in this court, than that a common carrier cannot, by contract, exempt himself from responsibility, for his own or his servants' negligence in the carriage of goods or passengers for hire. This is so, independently of Section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally. Cooley, Torts p. 687; 2 Thomp. Neg., 1025; *Roesner* v. *Hermann*, 10 Biss. 486; 8 Fed. Rep. 782; *Railway Co.* v. *Spangler*, 44 Ohio State, 471."

A private employer and his servant stand on equal footing to contract, and yet Judge GRESHAM held on a contract of this kind between them as stated in the syllabus (*Roesner* v. *Her-*

mann, 10 Biss. 486) that "A contract between an employer and employe, by which the employe, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employe, resulting from the negligence of his employer, is void as against public policy."

The statement in the opinion of the Appellate court on which really the conclusion reached is dependent viz: that the lease "simply provided that it should not assume an additional burden which it had the option to take or refuse" (Record, 48), is not sound. It may be conceded for the argument only that the road had the right to make the lease or refuse to make it. But if it should make it, it cannot be well contended that it had the right to assume or refuse to assume the legal duty which necessarily went with the making of the lease. In fact it had no right to make the lease, but if it did make it, then the duty of ordinary care went along with the transactions under the lease. The law was a necessary party to or element in the contract, and this the parties could not eliminate.

On account of the great importance of the question, the uncertainty as to what the law is governing this question, the diversity of judicial opinion already expressed thereon in this case, and the vast amount indirectly involved, we earnestly request that the writ asked for be granted, to the end that an authoritative opinion may be had from this court, settling at once this question for all parts of our country.

R. W. BARGER,
CHAS. A. CLARKE,
Attorneys for Petitioners.

No. 115 & 5

Brief of Clark & Barger for P.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Nov. 1, 1897.

OCTOBER TERM, 1897.

No. 115.

THE HARTFORD FIRE INSURANCE COMPANY, ET AL,
Plaintiffs in Error,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

ARGUMENT FOR PLAINTIFFS IN ERROR.

CHAS. A. CLARK AND
R. W. BARGER,
For Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 115.

THE HARTFORD FIRE INSURANCE COMPANY, ET AL,
Plaintiffs in Error,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

ARGUMENT FOR PLAINTIFFS IN ERROR.

BY CHAS. A. CLARK AND R. W. BARGER.

STATEMENT OF FACTS.

February 1, 1890, Simpson, McIntire & Co. entered into a contract of lease with the Chicago, Milwaukee & St. Paul Ry. Co. for a tract of ground, a portion of the station yards of the railway company at Monticello, Iowa, which lease contained the following clause:

"To hold, for the term of one year from the date hereof, for the purpose of erecting and maintaining thereon a cold storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars, in advance, and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors and administrators, and assigns, do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of, any building or buildings now on, or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property remaining inside or out-

side of said buildings, by fire occasioned or originated by sparks, or burning coal from the locomotives, or from any damage done by trains, or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company; and further, that the said parties of the second part will in no way obstruct or interfere with the track of said railway company in using said premises." Record, p. 14.

Under this lease, Simpson, McIntire & Co. erected on the premises therein described, and adjacent to the tracks of defendant railway company, a cold storage warehouse. The insurance companies, plaintiffs in error, issued to Simpson, McIntire & Co. policies of insurance on this cold storage warehouse and its contents.

On the 11th day of November, 1892, the warehouse was set fire to and destroyed by negligence of the railway company in moving its engines and cars along the tracks adjacent to it. The total loss thus sustained was $27,118.88, the warehouse itself being of the value of $7,000, and the balance of the loss being upon butter and eggs stored therein.

The insurance companies were compelled to pay, and did pay to Simpson, McIntire & Co. $23,450 on this loss; whereupon, claiming to be subrogated to the rights of Simpson, McIntire & Co., they brought this action against the railway company to recover back that amount. The railway company set up the exemption contained in its lease above set forth *in haec verba*. To this defense the insurance companies demurred, substantially upon the ground that the attempt of the railway company to thus exempt itself from liability for loss and damage through its own negligence in setting fire to the property, was contrary to public policy, and void. Record, pp. 2 to 4.

Amended answer of defendant in error, Record pp. 13 to 16.

Demurrer of plaintiffs in error, Record p. 16.

The Circuit Court, in an opinion by Judge Shiras, overruled this demurrer and held the exemption in the lease a valid one. Record pp. 19 to 26. (This opinion is so mutilated in the record as to be hardly intelligible. For a correct copy of it see this case as reported. Hartford Fire Ins. Co. vs. Ry. Co., 62 Fed. Rep., 904.)

Thereupon the insurance companies sued out a writ of error from the Circuit Court of Appeals of The Eighth Circuit, where the judgment of the Circuit Court was affirmed. See opinion, Record p. 36.

Judge Caldwell, of the Court of Appeals, filed a dissenting opinion, refusing to concur in the doctrine that the exemption in the lease was valid; but concurring in the result reached, upon the ground that the Federal Courts were concluded by a decision of the Supreme Court of Iowa upon a similar question. Record p. 43. Judge Shiras, in passing upon the demurrer in the trial court, had expressly put his decision upon the same ground; having withheld his decision to learn what the final decision of the Supreme Court of Iowa would be. Record p. 20.

The Supreme Court of Iowa first held unanimously a stipulation of this character in a lease for a grain elevator contrary to public policy and void. This decision was rendered October 19, 1892.

Griswold vs. I. C. R'y Co., 53 N. W. Rep. 295.

The suit at bar was commenced in the state courts, May 10, 1893: Record p. 6; and petition was filed May 11, 1893. Record p. 5.

Then, under the above decision, the provision in the lease relied on by defendant, was void. Accordingly plaintiff filed its petition and bond for removal, and May 31, 1893, secured an order for such removal into the Federal Court, with the manifest purpose of claiming that the decision in the Griswold case did not bind the Federal Courts.

But a re-hearing was granted in the Griswold case; the Supreme Court of Iowa reversed the original unanimous decision, and by a divided bench, three to two, held that it was not contrary to public policy for a railway company to reserve the right to burn up the property of its patrons stored on its premises for shipment, as well as the station facilities or warehouses, which it had compelled such patrons to furnish for themselves, by its own failure to equip itself for a large part of its most profitable business. The date of this last decision was Feb. 3, 1894.

Griswold vs. R'y Co., 90 Iowa, 265.

Same case, 57 N. W. Rep., 843.

The defendant had been fleeing from the decisions of the state court: but it now at once, April 2, 1894, set up the right to burn the property given to it by its lease. Record p. 13.

And it claimed that this latest decision was binding on the Federal Courts!

A petition for re-hearing was filed in the Supreme Court of Iowa

against this second decision of the Griswold case, and it was this second petition which Judge Shiras awaited the decision of. See his opinion. Record p. 20.

Only when that petition was overruled did Judge Shiras learn what the decision of the state court was, which he felt bound to follow, and this was September 11, 1894, after this case had been pending in his court about one and one-half years!

This court granted a writ of certiorari to review the decision of the Court of Appeals of the 8th Circuit.

ASSIGNMENT OF ERRORS.

The plaintiffs in error aver and show that there is manifest error on the face of the record in the following particulars, to-wit:

1. The Circuit Court erred in overruling the demurrer of plaintiffs in error to the amendment to the answer of defendant in error, being count two of the answer contained in said amendment, and the Circuit Court of Appeals erred in affirming the said decision of the Circuit Court; and each of said courts committed separate and distinct error on each of the following grounds, in deciding the questions raised by said demurrer in favor of defendant in error:

a. The facts stated in said count do not amount to a defense, in that the said count does not deny the facts charged in the petition, and does not contain any matter or thing in avoidance of plaintiffs' right of action herein.

b. Said count does not show that the lease therein pleaded was in force or effect at the time of the fire complained of in plaintiffs' petition, and does not show any agreement at that time on the part of Simpson, McIntire & Company, except to pay rent and taxes as specified in and by the said lease.

c. The lease pleaded by defendant does not show any agreement to exempt defendant from liability for fires set by its locomotives in operating its line of railway. Said lease does not show what locomotives are intended or referred to therein or thereby.

d. The agreement contained in said lease is too vague, indefinite and uncertain to exempt defendant from liability for the fire set out as charged in plaintiffs' petition herein.

e. The agreement alleged to be contained in said lease is contrary to public policy and void, in that it seeks to exonerate defendant from liability from fires willfully or criminally set out by it, as

well as for fires set out by it through its own negligence or the negligence of its employes.

f. The said alleged agreement is further contrary to public policy and void in that it attempts to reserve to the defendant in error, a railway corporation, the right to negligently destroy and burn property of its patrons stored on its premises for shipment in the course of both state and inter-state commerce, as well as the right to destroy and burn station facilities and warehouses which it has compelled its patrons to furnish for themselves for use in making such shipments, and thus attempts to impose upon its patrons its own duties and onerous burdens and losses from its neglect of duty, and negligence as a common carrier of state and inter-state commerce.

g. Said lease does not contain any release which in law is effective or sufficient to exonerate defendant from liability for the fire set out as charged in plaintiffs' petition.

h. It is not alleged that plaintiffs or any of them had knowledge of the alleged agreement set out in the lease pleaded by defendant in and by the said count, and without knowledge thereof plaintiffs were not bound thereby.

2. The Circuit Court erred in rendering judgment in this action, upon the overruling of plaintiffs' said demurrer, in favor of the said defendant in error and against the plaintiffs in error, and the Circuit Court of Appeals erred in affirming said judgment. Record p. 43.

ARGUMENT.

I.

DUTY OF RAILWAY COMPANIES TO FURNISH WAREHOUSES AND ELEVATORS AT STATIONS.

"The duty of the carrier extends to the providing of proper and reasonable *station facilities*, such as platforms, *warehouses*, approaches and the like. And in the case of a carrier of live stock, it includes the furnishing of *proper yards*, gates, and other appliances necessary to enable the stock to be received, unloaded and delivered to the consignee."

Hutchinson on Carriers, 2 Ed. by Mechem, Section 295, d., citing:

Mason vs. R'y Co., 25 Mo. App., 473;

McCullough vs. R'y Co., 34 Mo. App., 23;

Covington Stock Yards vs. Keith, 139 U. S., 128.

In the case above cited, decided by this court, it was said, opinion by Mr. Justice Harlan: "The railroad company ***holding itself out as a carrier of live stock*** was under a legal obligation, arising out of the nature of its employment, to provide SUITABLE AND NECESSARY MEANS AND FACILITIES FOR RECEIVING LIVE STOCK OFFERED TO IT FOR SHIPMENT OVER ITS ROAD AND CONNECTIONS, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matter is whether the means and facilities so furnished by the carrier, or by someone in its behalf, are SUFFICIENT FOR THE REASONABLE ACCOMMODATION OF THE PUBLIC. * * * * * * * * *

"*The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported*, as well as to the necessities of the respective localities in which it is received and delivered. * * * * If the carrier may not make such special charges in respect to stock yards which itself owns, maintains and controls, *it cannot invest any corporation or company with an authority* TO IMPOSE BURDENS OF THAT KIND *upon shippers and consignees.*"

Covington Stock Yards Co. vs. Keith, 139 U. S., 133-135.

That is the very question presented by this case. Over a great area of agricultural country the railway companies habitually and persistently refuse to furnish the elevators for grain, and cold storage warehouses for perishable food products, which are absolutely requsite for receiving and transporting these classes of property which the railways hold themselves out as carriers of, and which constitute an enormous mass of commerce from which they derive a large part of their revenues.

By refusing to furnish such facilities, can the railway companies impose new burdens and risks upon the public and upon their patrons, by requiring them to submit to having their property, which is the subject of carriage and commerce, and the facilities for handling it, which they are compelled to furnish, destroyed by the negligence of the carrier in setting fire to it?

If the railway companies furnished these warehouses themselves, as is their duty to do in order that their patrons may have adequate facilities, they would then clearly fall within the rule laid down by an elementary writer. "But, if they combine the two characters,

treating the deposit with them as being merely for the convenience of further carriage, or *to encourage or promote their business as common carriers*, they will be held to strict liability as such from the time of delivery to them. *In such cases the deposit is a mere accessory to the carriage, and for the purpose of facilitating it. The liability of the carrier begins with the receipt of the goods.*"

Hutchinson on Carriers, 2 Ed. by Mechem, Sec. 62.

The carrier could not, in such case, screen himself from liability for his negligent destruction by fire of the goods in his own warehouse. A railway company cannot do that in any case where goods are stored in its own warehouse. How, then, can a railway company compel its patrons to furnish the warehouses which it ought to furnish itself, and because they have done this, then compel them to submit to the risk of having not only the warehouses thus furnished, but the grain and perishable foods stored in them for carriage, destroyed by the negligence of it and its servants?

JUDICIAL NOTICE BY COURT.

That the railway companies, over a great area of country, do compel their patrons to furnish grain elevators and cold storage warehouses, is a matter of common observation and knowledge, and is witnessed by many decisions of courts of last resort. Thus, in Iowa, a railway which destroys one of these grain elevators by its negligence in setting fire thereto, is held liable to the owner of wheat stored therein by arrangement with the proprietor of the elevator.

In that case the Supreme Court of Iowa said: "While it is true, as claimed by appellant, that the court cannot take judicial notice of a custom to mix and mingle such property by warehousemen, yet *a court cannot ignore the fact that the grain elevators in this state cannot be operated in any other manner*. If the proprietor of an elevator should be required to store each farmer's grain in a separate bin, and for failure to do so should be held liable for a loss of the grain by fire, the business of storing grain in elevators would practically cease."

Arthur vs. C., R. I & P. Ry. Co., 61 Iowa, 648.

Numerous other cases in Iowa illustrate like questions which arise from the use of elevators built by third parties for receiving and shipping grain over railways.

Irons vs. Kentner, 51 Iowa, 90;

Johnson vs. Brown, 37 Iowa, 200;
Nelson vs. Brown, 44 Iowa, 455;
Marks vs. Cass County Elevator Co., 43 Iowa, 146;
Cathcart vs. Snow, 64 Iowa, 584;
Sexton vs. Graham, 53 Iowa, 181;
Nelson vs Brown & Doty, 53 Iowa, 555.

Undoubtedly the courts must take notice of this widespread condition of affairs, and of this method on the part of railway companies of compelling their patrons to furnish their own facilities. In a case where very similar questions were involved, it was said, by this court, opinion by Mr. Justice Blatchford:

"*We cannot close our eyes to the well known course of business in the country over very many of our railroads.* The contracts for transportation of goods are made, *not with the owners of the roads, nor with the railroad companies themselves*, but with transportation agencies, or companies, which have arrangements with the railway companies for carriage. *In this manner some of the responsibilities of common carriers are often sought to be avoided, but in vain.* Public policy demands that the right of the owners to *absolute security against the negligence of the carrier, or of persons engaged in performing the carrier's duty*, should not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company."

Bank of Ky. vs. Adams Ex. Co., 93 U. S., 181.

Other decisions of this court are to the effect that it will take judicial notice of the widespread course of business and trade involved in these practices by railway companies. Thus, it has been held that:

It will take notice of whatever is generally known within the limits of its jurisdiction.

Brown vs. Piper, 91 U. S., 37;
Phillips vs. Detroit, 111 U. S., 604;
King vs. Gallun, 109 U. S., 99;
Terhune vs. Phillips, 99 U. S., 592.

It will take judicial notice of the fact that it is the usual course of trade to make advancements in New York upon the purchase of agricultural products in Ft. Wayne, Indiana, on the transfer of evidences of title, such as warehouse receipts. Such is

"*The usual course of the great inland commerce by which the large*

part of the agricultural products of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing; and it embraces such a wide extent of territory, and is of such general importance that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them as it judicially recognizes the general and established usages of trade on the ocean."

Gibson vs. Stevens, 8 Howard, 399.

This language of Chief Justice Taney aptly describes the situation in the case at bar, and the widespread and general usage and custom involved in the questions which it presents for solution.

II.

CONTRACTS ATTEMPTING TO EXEMPT FROM LIABILITY FOR NEGLIGENCE ARE CONTRARY TO PUBLIC POLICY AND VOID.

As to negligence it has been said:

"It is the duty of men, whether individual or corporate, as we have many times had occasion to consider, to manage their own affairs carefully and circumspectly for the avoidance of injury to others, and a neglect of this duty, resulting in harm to any person, places them under an obligation from the law to compensate him. This is one of the most important of the fundamental doctrines of non-contract right and wrong. It is a clear and unmutilated excerpt from natural justice itself, handed down by God, and requiring no manipulations by man to adapt it to human use. In almost every chapter of this volume we have seen its beneficent workings. If it has not found a place among the limitations of legislative power in our written constitutions, the reason is, not its unworthiness, but the confidence of their makers that no legislator or judge will be so unmindful of the proper functions of his office as to disregard it. Such, therefore, is both the policy of law and the law itself, in the highest sense fundamental and unyielding."

Bishop Non-Contract Law, p. 1074.

The same author further states:

"So that, in short, all stipulations to overturn—or in evasion of —what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments or obstructing its officers in their official acts, or corrupting them; all, detrimental to the public order and public good, in such

manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong, are void. If a court should enforce them, *it would employ its functions in undoing what it was established to do.* The act would be in the nature of suicide."

Bishop on Contracts, Sec. 549.

And again:

"The mere tendency of a contract to promote unlawful acts, renders it illegal as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts; for example, it tends to fraud, for the officers of a corporation to speculate on claims against it. Therefore, a contract by such officers for the purchase of a claim against the corporation cannot be enforced. And though on the face of the contract nothing unlawful appears, if the parties meant thereby to accomplish an unlawful object, it will be invalid."

Bishop on Contracts, Sec. 476.

"A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibited by a statute, termed a contract against public policy, or sound policy, is likewise void."

Bishop on Contracts, Sec. 473.

It is enough that such contracts have an illegal or corrupt tendency. It is not necessary for it to appear that the result must be or will be corrupt or illegal. But if their tendency is toward a corrupt or illegal result, they will be unhesitatingly declared void.

Bestor vs. Wathen, 50 Ill., 138;
Woodstock Co. vs. Extension Co., 129 U. S., 663;
Fuller vs. Dame, 18 Pick., 472;
Oscanyan vs. Arms Co., 103 U. S., 261-267, 273;
Tool Co. vs. Norris, 2 Wall. 45;
Hamilton vs. Hamilton, 89 Ill., 351;
Thomas vs. Caulkett, 57 Mich., 394.

Public policy should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

Cooley on Torts, 687.

The principle which invalidates a stipulation for exemption from

liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally.

Johnson vs. Ry. Co. (Va)., 11 S. E. Rep., 829.

"A railway is a *quasi* public corporation, and owes certain duties to the public, among which are the duties *to afford reasonable facilities for the transportation of persons and property*, and to charge only reasonable rates for such services. Any contract by which it disables itself from performing these duties or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void. * * * Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them in."

C., M. St. P. Ry. Co. vs. Wabash Ry. Co., 9 C. C. A., 664-5.

It is as much the duty of a railway company to furnish warehouses for the accommodation of its patrons, as it is to carry their goods upon cars.

A great economical question is presented in the distribution, as well as the production of foods and manufactures. Railway companies undertake to deal with the problem of distribution. It is a duty they owe to the public to deal efficiently with this problem.

In the onward march of the distribution of food products, elevators and cold storage warehouses in connection with railways have become an imperative necessity for the public. This is so in order that perishable products may be shipped in carload lots in refrigerator cars, and that such products may be stored until ready for shipment in sufficient quantities, and until special cars can be secured at such times as markets are satisfactory to shippers. For all of these reasons, cold storage warehouses and other warehouses are of imperative importance to the public.

It is the duty of the railway companies to furnish these warehouses as necessary facilities for shipping and handling freight in connection with their railways. They may so furnish the warehouses through lessees who build them upon the railway grounds, or they may erect such warehouses themselves for the convenience of their shippers. If they erect the warehouses, the notion would not be tolerated for an instant that they could exempt themselves, by contract, from the destruction, through their own negligence, of perishable articles of food stored in their own cold storage warehouses. How,

then, can they exempt themselves from the same destruction through negligence, in warehouses of their lessees? The same considerations apply to elevators.

To hold such a rule would be to enable railway companies to erect warehouses on their own grounds, lease them to their own irresponsible employes, with a contract that they should not be liable for the destruction of such warehouses or contents by fire, and thus by indirection avoid a liability which no court would permit them to escape by direct contract and direct action. It cannot be that the courts will tolerate this course of conduct when it is seen to what evil results it will lead, if the door is opened. That railway companies will not, by indirection, be permitted to impose additional burdens or hardships upon the public, and that all contracts between themselves and third parties having that effect will be void, see

Woodstock Co. vs. Extension Co., 129 U. S., 657.

Fuller vs. Dame, 18 Pick., 472.

It is certain that a contract with its lessees, exempting a railway company from liability, for negligence in destroying elevators or warehouses and property stored therein by its patrons, in connection with its lines of railway, have a wrongful tendency on the part of the railway company in the carrying out of its duties to the public and in the operation of its railway. It tends to secure less diligencc towards the public touching goods stored on its lines for shipment, or which have been shipped over its lines of railway, than the degree of diligence which the public is entitled to.

As to third parties who might store grain or goods in the warehouses or elevators in question, for shipment over the lines of railway, this is very clear, and on principle it is equally clear as to the lessees themselvcs.

In a recent decision of this court, where the question was as to the validity of a contract agreeing never to import, manufacture or sell certain machines or devices, etc., it was said, opinion by Mr. Justice Brown:

"It may be understood in general that contracts which are detrimental to the interests of the public *as understood at the time*, fall within the ban The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage, are treated as legal and binding. In certain cases a man may

doubtless agree that he will interpose no defense to a specified claim, and that another may take judgment against him without notice. This is a matter of every-day occurrence in connection with what are termed judgment notes. But if one should agree for a valuable consideration, that he would set up no defense to any action which another might bring against him, and such other person might enter up judgment against him in any such action without notice, we think that no court would hesitate to pronounce such an agreement invalid. * * It is a serious question whether public policy permits a man to barter away beforehand, his right to defend unjust actions or classes of actions, though in an individual case he may doubtless assent that a judgment be rendered against him, even without notice."

Pope Manfg. Co. vs. Gormully, 144 U. S., 233-4.

See particularly the authorities cited in that case.

To same effect are Ins. Co. vs. Morse, 20 Wall., 451.

In a case where the plaintiff was traveling upon what was in form a free pass, exempting the railway company from liability, the fact being that by agreement he was going to exhibit a new coupler to the officers of the railway, it was held that he was not bound by a stipulation exempting the company from liability for injuries received through its negligence. This court said, opinion by Mr. Justice Bradley:

"We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked, with apparent confidence, 'May not men make their own contracts, or in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one. But there is a question lying behind that. 'Can a man call that absolutely his own which he holds as a great public trust, by the public grant, and for the public use as well as for his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

Ry. Co. vs. Stevens, 95 U. S., 660.

This language indicates clearly enough that this court is far from approving the notion that the right of freedom of contract en-

titles a railway company to protect itself from the result of its own negligence.

"It is the law of this court that a common carrier may by special contract limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. N. J. Steam Nav. Co. vs. Merchants Bank, 6 How., 334; York Co. vs. Central R. R. Co., 3 Wall., 107; R. R. Co. vs. Lockwood, 17 Wall., 357; Express Co. vs. Caldwell, 21 Wall., 264; R. R. Co. vs. Pratt, 22 Wall., 123; Bank of Ky. vs. Adams Express Co., 93 U. S., 174; Ry. Co. vs. Stevens, 65 U. S., 655."

Hart vs. Pa. R. R. Co., 112 U. S., 338.

The almost unbroken current of authority in the United States supports the proposition that a railway company cannot, by contract or otherwise, limit its liability for negligence in any degree. For a multitude of authorities supporting this proposition, see,

Note 4, Little Rock Railway Co. vs. Craven, 7. A. R. R. & C. Rep., 284. (Published by Myers & Co., Chicago.)

One of the duties of a railway company is to furnish facilities in the form of side tracks and premises for grain elevators and warehouses. And it cannot discriminate between its patrons in this particular.

State vs. Mo. Pac. Railway Co. (Neb.) 45 N. W. Rep., 785.

This is like the case of a railway company being prohibited by public policy from granting an exclusive privilege of maintaining and operating a telegraph line on its right of way.

Pensacola Co. vs. W. U. Co., 96 U. S., 1.

W. U. Co. vs. Am. U. Co., 65 Geo , 160.

As to the duty of a railway company to furnish facilities for elevators and warehouses, see further, and especially, a recent case strongly maintaining the doctrine.

Farwell Assn. vs. Ry. Co., 55 N. W. Rep., 248.

Vincent vs. Ry. Co., 49 Ill., 33.

Chicago, Etc. Ry. Co. vs. People, 56 Ill., 365.

Chicago, Etc. Ry. Co. vs. Suffern, 129 Ill., 274.

Ry. Commissioners vs. Ry. Co., 63 Me., 269.

A railway company cannot discriminate between different grain elevators at the same station or between different stock yards in the same town.

Vincent vs. Ry. Co., 49 Ill., 33.

Chicago, Etc. Co. vs. People, 67 Ill., 19.

Granting sidetracks to some and refusing the same to others under similar circumstances, is an undue preference and contrary to law.

Beston Co. vs. Midland Ry. Co., 5 Ry. & Canal Traffic Cases, 53.

Giradot vs. Midland Ry. Co., 5 Ry. & C. T. Cases, 60.

Railway companies are compelled to furnish the same facilities on their station grounds for different merchants dealing in coal.

West vs. London Ry. Co., L. R., 5 C. P., 622.

Obviously, if railway companies, as a part of their duties to the public, are bound to furnish facilities of this character, it is impossible that they can, under the theory that granting such facilities is a matter of favor and grace, screen themselves for negligence towards patrons who are entitled, as a matter of right, to erect elevators or cold storage warehouses on the railway grounds.

In other words, when a patron demands facilities for a warehouse or elevator, and is entitled to such facilities as a matter of law, the railway company cannot say, "We will perform our duty and furnish you such facilities as you are entitled to, upon condition, however, that you shall agree that we may burn your property up negligently, without being liable therefor." This would be equivalent to the denial of such facilities altogether, and equivalent to repudiating altogether an important duty and obligation which the railway company owes to the public.

This doctrine goes upon the same ground as the decisions which maintain a very well established rule, that a railway company cannot give to one line of hackmen the exclusive right to enter upon its depot grounds to receive or deliver passengers. It must afford equal facilities to all.

Cravens vs. Rogers, (Mo.,) 14 S. W. Rep., 106.

Montana Union Ry. Co. vs. Langois, 9 Mont., 419; 24 Pac. Rep., 209.

Kal. Hack Co. vs. Soosma, 84 Mich., 194; 47 N. W. Rep., 667.

Summit vs. State, 8 Lea, 413.

Tobin vs. R'y Co., 59 Me., 183.

In Re Marriott, 1 C. B. (N. S.) 499.

The familiar ground of these decisions is, that the law will not permit undue or unreasonable preferences to be given in the right to be admitted to station grounds for the transaction of business with the railway company, among those who conduct themselves in a business like and orderly manner, nor will exclusive privileges be allowed to some in plying their business, over and upon such grounds,which are denied to others.

See also the very able dissenting opinion of three judges, in

Old Colony R'y Co. vs. Tripp, 147 Mass., 41.

As we have already seen it is settled law that:

"The duty of the carrier extends to the providing of proper and reasonable station facilities, such as platforms, WAREHOUSES, approaches and the like. And in the case of a carrier of live stock, it includes the furnishing of PROPER YARDS, gates and other appliances necessary to enable the stock to be received, loaded, unloaded and delivered to the consignee. *For performing these services the carrier cannot impose an extra charge, or authorize or require some other person or corporation to perform it and insist upon extra compensation.*"

Hutchinson on Carriers, Sec. 295, d.

Mason vs. R'y Co., 25 Mo. App. 473.

McCullough vs. R'y Co., 34 Mo., App. 23.

Covington Stock Yards vs. Keith, 139 U. S. 128.

The decision of this court last above cited seems to us conclusive of much that is involved in the case at bar. Under that decision, inasmuch as railway companies engage in the shipment of perishable food products, they must furnish the proper warehouses to handle such freight without injury, at points to and from which such shipments are made, the same as they are bound to furnish special facilities, including yards with gates, chutes, etc., for the shipment of live stock. For furnishing these facilities in the form of cold storage warehouses for shipments of perishable freights, railway companies cannot charge any additional compensation any more than for facilities for handling live stock. Neither can they authorize others who may build cold storage warehouses upon their grounds to charge additional compensation. This being so, it would seem to conclusively follow that railway companies cannot impose additional obligations and risks upon their patrons, if they fail to furnish the warehouses themselves, by saying to such patrons, "You may furnish your own warehouses on our grounds, but it shall be at the risk and peril of having them burned up by our negligence, in which case you shall

receive no compensation for your property destroyed." This is clearly the equivalent of demanding additional compensation.

Covington Stock Yards Co. vs. Keith, 139 U. S., 133-136.
Oregon vs. S. L. etc. Ry. Co. vs. I. R. Y. Nav. Co., 51 Fed. Rep., 613.
I. R. Steamboat Co. vs. E. C. Transportation Co., 10 So. Rep., 480.

Applying the above doctrine of this court to railway companies who become carriers of perishable food products, such as butter, eggs, cheese, poultry, meats, etc., *it is clearly their own duty to maintain the proper cold storage warehouses for receiving and delivering these products as they may be presented by the patrons for shipment, just as it is the duty of the railway company to provide stock yards for receiving and delivering live stock.*

Neither can a railway company impose any additional burden or charge upon its patrons, *such as maintaining cold storage warehouses on their own account, or paying for storing perishable products in warehouses maintained by their lessees,* at points to and from which such shipments are made.

This being so, it is entirely clear that it is no act of grace on the the part of a railway company to allow a patron to put up a cold storage warehouse or an elevator for the shipment of grain where it has no such facilities of its own, but it is simply the performance of a duty on the part of the railway company. Furthermore, as this is one of the duties of the railway company, it falls within the established doctrine of this court, and all the other authorities above cited, *to the effect that a railway company cannot by any contract screen itself from the result of its own negligence* IN THE PERFORMANCE OF A DUTY WHICH IT OWES TO THE PUBLIC. Indeed, when it is established that it is the duty of a railway company to maintain adequate warehouses and elevators, and we think the Covington Stock Yards case establishes this doctrine, that is really an end of the principal argument upon which the railway company in this case relies. It seeks to masquerade in this case as a mere benefactor, performing a gracious act of kindness and charity in permitting a warehouse of this character to be built upon its grounds, and hence the argument is particularly made that as it acts in this beneficient and gracious character, it may contract against the results of its own negligence. This masquerade, however, is brought to a sudden termination by the authorities above cited. The railway company, in the light of these decis-

ions, stands in its true character of owing a duty to the public in furnishing warehouses, which it is seeking to escape, and as to which *it is seeking to impose additional burdens upon the patrons of the road and the public, by and through the agreement which we respectfully insist should be declared contrary to public policy and void.* Surely the courts will not permit THIS ADDITIONAL BURDEN to be imposed upon a great industry, namely: the transportation of perishable food products, in which the populations of all our great cities, no less than the producers upon numberless farms, are directly interested. If a railway company has not an imperative public duty here, it would be difficult to imagine a case in which such duty exists. And it would be equally difficult to imagine a case, if this be not one, in which the courts acting on behalf of public policy and public morals, will not tolerate the effort of a railway company to escape from its duties and obligations by means of a sharp contract, wrung from the necessities of the shipper, *designed and intended to make the carrier more negligent, careless and inefficient, in the discharge of duties of the most important character.*

It is settled by the decisions in Iowa that a railway company must furnish *suitable cars* for transporting perishable food products safely.

Beard vs. Ry. Co., 79 Iowa, 518.

Why does not this doctrine also apply to furnishing *suitable terminal facilities* for safely handling, shipping and delivering such products?

Take the matter of shipments of grain; a tremenduous volume of transportation and commerce is furnished the railways from this source. Are they under no obligations to furnish warehouses or elevators for handling this business? The live stock case above cited holds that they are. How, then, can railways refuse to furnish any facilities for the shipment of grain, and maintain their right to negligently burn elevators which they compel their patrons to build for the purpose of carrying on this great branch of interstate commerce? When they attempt to contract for the right to destroy elevators and warehouses, and to destroy the contents thereof in the form of merchandise collected and delivered by their patrons at such elevators and warehouses for the express purpose of being shipped over their lines, do they not attempt to escape the performance of a plain and manifest public duty? And this being so, can it be denied that all such contracts are contrary to public policy and void?

It is undeniable that these matters necessarily pertain to interstate commerce. If the court will take judicial notice of what is generally known and understood among the people, it will be found that grain and these perishable products are habitually, continuously, and almost without exception, shipped from one state to another, as the surplus of the producer in Iowa permits, and the necessities of the consumer in eastern states, for instance, demand. To say that this is a matter which pertains simply to Iowa and its police regulations, seems to us to be taking a very short-sighted and fanciful view of the real merits of this controversy.

III.

COMMON CARRIER CANNOT CONTRACT FOR EXEMPTION FROM NEGLIGENCE.

As to all matters wherein a railway contracts as a common carrier, the law is settled by this court, that contracts attempting to exempt such railway company from the negligence of itself or its servants, are contrary to public policy and void. The rule is stated with a citation of authorities in an opinion already quoted, supra, by Mr. Justice Blatchford.

And in the same case the effect of a former noted decision was summarized as follows:

"In Railroad Company vs. Lockwood, 17 Wall, 357, the following propositions were laid down by this court: (1) A common carrier cannot lawfully stipulate for exemption from responsibility *when such exemption is not just and reasonable* in the eye of the law. (2.) *It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;* (3). These rules apply both to carriers of goods and to carriers of passengers for hire, and with special force to the latter. The basis of the decision was, that the exemption was to have applied to it *the test of its justness and reasonable character.* It was said that the *contracts of the carrier 'must rest upon their fairness and reasonableness.'*"

Hart vs. Pa. Ry. Co., 112 U. S., 338.

In one of the decisions cited by Mr. Justice Blatchford, supra, it was said, opinion by Mr. Justice Strong:

"It is agreed, however, that a common carrier cannot by any contract with its customers relieve himself from responsibility for his own negligence, or that of his servants, and this *because such a contract is unreasonable* and contrary to legal policy. * * *

"The foundation of the rule is, that it tends to the greater security of consignors, *who always deal with carriers at a disadvantage.* It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and *by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care,* or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and *makes common carriage more unreliable.* This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant." * * *

"*We cannot close our eyes to the well known course of business in the country.* Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies, which have arrangements with the railroad companies for the carriage. *In this manner, some of the responsibilities of common carriers are often sought to be evaded, but in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty,* shall not be taken away by any reservation in the carrier's receipt, *or by any arrangement between him and the performing company.*"

Bank of Ky. vs. Adams Ex. Co., 93 U. S., 181-183-185.

This authority is important for several reasons. To begin with, it shows that the courts will notice, judicially, the general and well known course of business in matters connected with railway transportation. Then it settles the doctrine that a railway cannot evade any of its duties or responsibilities by compelling its patrons to contract with a third party. Thus, if those who have erected warehouses and elevators on railway grounds, receive from producers and shippers, grain in their elevators, and perishable commodities of food in their cold storage warehouses, for convenient shipment and handling, it is perfectly clear under the authority of this case and the live stock case, that the railway company could not as to such third parties, escape liability for a fire negligently set out by its employes, and which destroyed such elevator or warehouse and contents, but would be compelled at any rate to respond in damages, and to pay the patron who had thus *stored* his grain or food product for the purpose of securing

necessary facilities in handling and shipping the same. As to these third parties, it is undeniable that they could maintain their action, notwithstanding the contract of the railway company with the owner of the elevator or warehouse, that it would not be liable for the destruction of such buildings, or the contents thereof, by reason of fire negligently set out by its employes. The patron is plainly entitled to "security against the negligence of the carrier and of all persons engaged in performing the carrier's duty, and that security cannot be taken away by any arrangement between the carrier and the performing company."

As to the doctrine of the Lockwood case, see Ry. Co. vs. Pratt, 22 Wall., 134.

In another case dealing with the duties and liabilities of a common carrier it was said, opinion by Mr. Justice Gray:

"The employment of a common carrier is a public one, *charging him with the duty of accommodating the public in the line of his employment.*"

We have already seen that furnishing the necessary stock yards, elevators, warehouses, etc., to afford the shipper facilities and conveniences, is a part of the duty of such common carrier, and a part of the accommodation which the carrier owes to the public.

In the same case it was further said by Mr. Justice Gray:

"*A carrier who stipulates not to be bound to the exercise of care and diligence, seeks to put off the essential duties of his employment.*"

And this is as true with relation to terminal facilities for shipment and delivery, as it is with reference to the actual hauling of merchandise while in transit.

Again it is said in the same opinion:

"Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely and abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

"The carrier and his customer do not stand upon a footing of equality. *The individual customer has no real freedom of choice.* He cannot afford to higgle or stand out and seek redress in the courts. He prefers rather to accept any bill of lading, or sign any paper

that the carrier presents, and in most cases *he has no alternative but to do this or abandon his business.*" * * *

"It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care and diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence."

Liverpool Steam Co. vs. Phœnix Ins. Co., 129 U. S., 440-441.

Other cases recognizing the same rule that a common carrier cannot by special contract limit its liability for losses through the negligence of itself or employes, are

Ex. Co. vs. Caldwell, 21 Wall, 267.

York Co. vs. Central R'y Co., 3 Wall, 107.

"Any contract which undertakes to relieve a railway company of its duties to the public, is a violation of its contract with the state, and is void as against public policy."

Thompson vs. R'y Co., 101 U. S., 71.

A railway company "is not strictly a private but a *quasi* public corporation, and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of any of those duties to the public, the performance of which by the corporation was the remuneration that it was required by law to make to the public in return for the grant of its franchise."

Transportation Co. vs. Pullman Co., 139 U. S., 51.

And it is well settled that as to merchandise in transit, a railway company cannot by contract exempt itself from liability, if such merchandise is destroyed by fire set by its own negligence or the negligence of its employes.

Wharton on negligence, Sec. 598.

Condict vs. R'y Co., 54 N. Y., 500

Empire Trans. Co. vs. Wamasutta Co., 63 Pa., St.

N. J. R. Co. vs. Canard, 9 Harris (N. J.,) 204.

Steinwig vs. Erie Co., 43 N. Y., 123.

Davidson vs. Graham, 2 O. St., 131.

Why, then, should it be tolerated that the railway company may exempt itself from the like liability as to merchandise gathered upon its grounds for shipment, although stored in warehouses or elevators belonging to others? The fact that the railway company has compelled or induced others to furnish needed facilities in the form of elevators and cold storage warehouses, surely ought not to exempt it from this liability any more than as though it had itself

discharged its duties to the public and furnished these needed facilities.

In the case at bar the contents of the warehouse, as well as the warehouse itself, were destroyed. We submit that the railway company could not contract for the right to burn up either species of property without being liable to respond in damages under the authorities cited above.

IV.

EVEN IF THE RAILWAY COMPANY DID NOT CONTRACT AS COMMON CARRIER THE EXEMPTION WHICH IT PLEADS IS STILL CONTRARY TO PUBLIC POLICY AND VOID.

It will be contended that in executing the lease which it pleads, the railway company did not contract as a common carrier, and hence is not within the principle of the authorities already cited.

We think it is demonstrated by these authorities that the railway company in providing for the erection of warehouses in connection with its stational facilities was contracting with reference to its duties as a common carrier, and hence that the authorities which we have cited apply with full force.

But if this is not so, is it not true that a railway company owes many duties and obligations to the public which are incidentally connected with its occupation as a common carrier, and that as to such duties and obligations it can no more screen itself by contract from a liability for breach thereof, than it can do in matters pertaining strictly to its functions and character as common carrier.

Thus it is liable as warehouseman after merchandise has arrived at its destination, if not called for promptly by the consignee. Can it by contract screen itself from liability for negligence while it holds the merchandise as warehouseman?

The intimate relationship between the dual character of carrier and warehouseman, both of which a railway company sustains to the public, is well understood. An elementary writer treating of this question, says of the railways:

"But if they combine the two characters, treating the deposits with them as being merely for the convenience of further carriage, or to encourage or promote their business as common carriers, they will be held to a strict liability as such, from the time of delivery to them. *In such cases the deposit is a mere assessory to the carriage* and for the purpose of facilitating it. And liability *of the carrier* begins with the receipt of the goods."

Hutchinson on Carriers, 2 Ed., by Mechem, Sec. 62.

Obviously enough a railway company cannot screen itself from liability for the negligent performance of its duties as warehouseman, a relation so closely and inseparably connected with its vocation of common carrier. And this is so whether it discharges its duties as warehouseman itself, or induces, permits or compels others to discharge the duties.

Again, in making its contracts with its servants, a railway company does not act strictly in its capacity as common carrier, and yet it cannot screen itself from liability for injuries inflicted upon such servants through its own negligence. Such contracts have been repeatedly held to be contrary to public policy and void.

Kan. Pac. R'y Co. vs. Keeley, 29 Kan., 169.

Little Rock, Etc., R'y Co vs. Eubanks, 48 Ark., 460.

R'y Co. vs. Spangler, 44 O. St., 476-9.

In the case last cited the court said:

"It is the fairly established policy of our law that such liability should attach. * * * The policy of our law being well settled, it only remains for us to inquire WHETHER RAILWAY COMPANIES MAY IGNORE OR CONTRAVENE THIS POLICY BY PRIVATE CONTRACT WITH THEIR EMPLOYES, STIPULATING THAT THEY SHALL NOT BE HELD LIABLE FOR THE NEGLIGENCE OF THEIR EMPLOYES WHICH PUBLIC POLICY DEMANDS SHOULD ATTACH TO THEM. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in the public necessity and policy which should not be allowed to yield to mere private interests and agreements."

The same doctrine was maintained as between a private employer and his servant, in a decision by Judge Gresham.

Roesner vs. Herrman, 10 Biss., 486.

And see Thompson on Negligence, Sec. 1025.

If railway companies may not contract for the right to injure employes through negligence, it is impossible to see how they may contract for the right to destroy the property of their patrons who deal with them in matters of transportation and commerce, through the like negligence of themselves or that of their servants.

Take duties and obligations which arise from quasi public or public occupations wholly outside of railway companies and common carriers, and many cases will be found where it surely could not be held that one may by contract screen himself from the results of his own negligence. Thus take the case of the innkeeper.

Would it ever be permitted that he might, by regulation or express writing, make contracts with his guests that he would not be liable for their personal effects destroyed by fire through his negligence or otherwise lost through his negligence, while the relation of innkeeper and guest existed?

So take the case of a miller. Would the law permit him to screen himself from liability for destruction of his patron's grain through his own negligence, while in his possession for the purpose of being ground, to be redelivered as flour or meal?

Take the case of the banker. Would he be permitted to screen himself by contract, from liability for the money of a depositor negligently de-troyed, or negligently permitted to be stolen by a dishonest employe?

Matters of this kind go to the very foundation of the entire modern industrial and business structure. The whole fabric may be overturned and destroyed if the doctrine contended for by defendant in error in this case can be upheld.

Telegraph companies furnish a good illustration. They are not common carriers, and yet they may not limit their liability for the negligence of themselves or their servants by contract. Thus it is said:

"Telegraph companies, THOUGH NOT COMMON CARRIERS, are engaged in a business that is, in its nature, almost, if not quite, as important to the public as is that of carriers. LIKE COMMON CARRIERS, THEY CANNOT CONTRACT WITH THEIR EMPLOYERS FOR EXEMPTION FROM LIABILITY FOR THE CONSEQUENCES OF THEIR OWN NEGLIGENCE. * * * Whether their rules ARE REASONABLE OR UNREASONABLE MUST BE DETERMINED WITH REFERENCE TO PUBLIC POLICY PRECISELY AS IN THE CASE OF A CARRIER."

Adams Ex. Co. vs. Caldwell, 21 Wall, 269.

Still it is true that:

"THE LIABILITY OF A TELEGRAPH COMPANY IS QUITE UNLIKE THAT OF A COMMON CARRIER. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves. * * * The telegraph company is entrusted with nothing but an order or message which is not to be carried in the form in which it is to be received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be subject to embezzlement; which is of no intrinsic value," etc.

Grinnell vs. W. U. Co., 113 Mass., 301.

HOWEVER, IT IS WELL SETTLED THAT A TELEGRAPH COMPANY IS, as held in the decision of this court cited above, LIABLE FOR NEGLIGENCE IN THE TRANSMISSION OF MESSAGES NOTWITHSTANDING REGULATIONS AND CONTRACTS ATTEMPTING TO SCREEN ITSELF FROM SUCH LIABILITY. As to this see

Thompson vs. Telegraph Co., 64 Wis., 531.

Harkness vs. Tel. Co., 73 Iowa, 590.

Not only is this so, but THE FEDERAL COURTS WILL NOT FOLLOW THE DECISIONS OF THE STATE COURTS WHERE THE CONTRACT IS MADE, HOLDING SUCH A CONTRACT TO BE VALID, and that it exonerates the telegraph company from damages for negligence; but the Federal Courts determining the validity of such contract for themselves, hold it contrary to public policy and void.

W. U. Tel. Co. vs. Cook, 9 C. C. A., 680.

A telegraph company, though not liable as a common carrier, is bound to use care and diligence in delivering all messages tendered to it, and cannot by special contract relieve itself from liability for failure to do so.

Smith vs. W. U. Co., (Ky.,) 8 A. & E. Cor. Cases, 13.

"While they may reasonably restrict their liability, yet, they cannot do so against their own negligence. They undertake to exercise a public employment, which in many respects is analogous to that of a common carrier, and they must therefore bring to it that degree of skill and care which a prudent man would under the circumstances exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its non-use, is forbidden by the demands of a sound public policy."

This reasoning applies with full force as to railway companies with reference to furnishing warehouses, elevators and other terminal facilities.

Numerous other states hold the same doctrine as to telegraph companies.

Brown vs. Postal Tel. Cable Co., (N. C.,) 39 A. & E., Cor. Cases, 583.

Gillis vs. Tel. Co., (Vt.,) 25 A. & E. Cor. Cases, 568.

W. U. Co. vs. Crall, (Kas.,) 21 A. & E. Cor. Cases, 95.

W. U. Co. vs. Reynolds, (Va.,) 5 A. & E. Cor. Cases, 182.

W. U. Co. vs. Meredith, (Ind.,) 8 A. & E. Cor. Cases, 545.

Ayers vs. Tel. Co. (Me.,) 21 A. & E. Cor. Cases, 155.
Gulf Etc. Co. vs. Miller, (Tex.,) 21 A. & E. Cor. Cases, 80.
Marr vs. W. U. Tel. Co., (Tenn.,)16 A. & E. Cor. Cases, 243.

Sleeping and parlor car companies are not liable as common carriers nor as innkeepers, yet they must exercise due diligence in protecting both passengers and their property.

Hutchinson on Carriers, 2 Ed., by Mechem, Sec. 617 d to 617 k, and authorities there cited.

It surely never would be tolerated that these companies could enter into contracts with their patrons, protecting themselves from the duty and obligation to exercise due care, and screening themselves from the results of their own negligence or the negligence of their conductors, porters and other employes.

A lawyer would not be permitted to make a contract screening himself from negligence in making collections, or in transacting other professional business committed to his hands by his clients. A physician or a surgeon would not be allowed to contract for exemption from liability in administering medicine, using the knife, or reducing and treating fractures.

These are all illustrations relating to public, or *quasi* public occupations, and which seem to us to illustrate the mischiefs of the doctrine contended for by defendant in error in the case at bar, and to show that even though a railway company contracts in a character somewhat different from that of a common carrier when it authorizes warehouses and elevators on its station grounds, yet none the less it is still contracting with reference to matters touching which it has a public duty and a public obligation to perform, and where as said in the Ohio case supra, "its liability for negligence is not created for the protection of lessees simply, BUT HAS ITS REASON AND FOUNDATION IN THE PUBLIC NECESSITY AND POLICY, WHICH SHOULD NOT BE ALLOWED TO YIELD TO MERE PRIVATE INTERESTS AND AGREEMENTS."

Take the case of the electric light company engaged in furnishing lights for a populous city or town. Would it be permitted to contract with its patrons that it should not be liable for dwellings and business blocks which it attempted to light, if burned up by its own negligence? There surely seems to be but one answer to this question. Entire communities would be at the mercy of such a corporation if it could make and maintain such a contract, and thus acquire the right to nullify all statutes and police regulations established to prevent the setting out and spreading of fires. Yet, as to this a rail-

way company uses agencies practically as dangerous as an electric light company, and it will hold cities and towns at its mercy, and in like manner abrogate statutes, ordinances, police regulations and all precautions which public authorities may take against danger from fires, if it may enter into contracts of this character and such contracts are held to be valid.

"Every contract is declared void which contravenes any legal principle or enactment."

Aubert vs. Maze, 2 Bos. & Pul., 374.
Cannon vs. Bryce, 3 Barn. & Ald., 183.
Greennough vs. Balch, 7 Me., 390.
White vs. Buss., 3 Cush., 448.

As to contracts against public policy it was well said in an opinion by Mr. Justice Field: "The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country."

Tool Co. vs. Norris, 2 Wall, 45.

"Nor is the rule applicable only to contracts expressly forbidden, for it is extended to such as are calculated to affect the general interest and policy of the country."

Bank of U. S. vs. Owens, 2 Pet., 540.

"In our jurisdiction a contract may be illegal and void because it is contrary to the constitution or statute or inconsistent with sound policy and good morals. Lord Mansfield said, 'Many contracts which are not against morals are still void, as being against the maxims of sound policy.'

"It is a rule of the Common Law of universal application that where a contract, express or implied, is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice."

Trist vs. Child, 21 Wall, 448.

That one cannot in advance waive his rights of action by the wholesale, for injuries inflicted upon him, is held by this Court in a case where it was said:

"Every citizen is entitled to resort to all the courts of the country and invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights. * * * He cannot, however, bind himself in advance by an agreement which may be specifically enforced, thus

to forfeit his rights at all times and on all occasions whenever the case may be presented."

Ins. Co. vs. Morse, 29 Wall, 451.

"Whether forbidden by statute or condemned by public policy, the result is the same. No legal right can spring from such a source."

Meguire vs. Corwine, 101 U. S., 111.

"The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced."

Copell vs. Hall, 7 Wall, 558.

A contract having a tendency to secure the building of a railroad by a longer line than necessary is, within this doctrine, contrary to public policy and void.

Woodstock Iron Co. vs. Extension Co., 129 U. S., 644.

And see authorities there cited. Also see

Wardle vs. Ry. Co., 103 U. S., 658.

An agreement by a director of a corporation to keep another person permanently in place as an officer of the corporation is void as against public policy, even though there was not to be any direct private gain to the promisor. The court said, opinion by Mr. Justice Blatchford:

"We think this principle is clearly applicable on the ground of public policy, although there was not to be any direct private gain to the defendant. For, as was said by the Circuit Court in this case, it was the right of the other stockholders in the Baltimore United Oil Co. to have the defendant's judgment as an officer of the company exercised with sole regard to the interests of his company. A personal liability for damages on the part of the defendant in case the plaintiff should be removed after an agreement of the character alleged, was calculated to be a strong incentive to the defendant to act contrary to the true interests of the company and of its other stockholders."

West vs. Camden, 135 U. S., 521.

So in the case already cited, a contract with a corporation was held void, because it involved an abandonment in part of its duty to the public.

Central Trans. Co. vs. Pullman Car Co., 139 U. S., 24.

Where the statute of state provided that the mortgagee of real

property was not entitled to possession without a foreclosure and sale according to law, it was held that an agreement to put the mortgagee in possession on default in payment was contrary to public policy and void. The court said, opinion by Mr. Justice Woods:

"The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith & Teal would, upon default in payment of the note secured by the mortgage, deliver to Hewitt, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the state of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee; and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced."

Teal vs. Walker, 111 U. S., 252.

In like manner we may be permitted to say, in view of the public policy of Iowa, as found in the statute, making a railway company liable for fires set out by its own negligence, and in its other statutory provisions for preventing the setting out and spreading of fire, and in the common law principles which prevail everywhere, holding a tort feasor liable for his negligence, that the contract relied upon by the defendant in error, "although not expressly forbidden by law, yet like all contracts opposed to the public policy of the state, cannot be enforced."

This view is rendered the stronger and seems to us to be entirely conclusive when it is seen, as we shall attempt to point out, that an express statutory enactment could not screen a railway company, or a citizen, for fires negligently set out, or other injuries resulting to property through negligence. Under both the federal and state decisions, this would be an attempt to take the property of the citizen without compensation and without due process of law. If the attempt to pass such a statute were confined to railway companies, the law would be void under both state and federal constructions for its want of uniformity.

These considerations, we respectfully submit, conclusively demonstrate that the state could not, as a matter of police regulation, authorize the destruction of property in such manner as the railway company itself has attempted to authorize it by means of the contract upon which it relies. The defendant cannot do by contract what the state could not do by express statute. Such contract must be void where a statute would be void

V.

A STATUTE ATTEMPTING TO EXEMPT RAILWAYS FROM LIABILITY FOR DAMAGES CAUSED BY FIRES NEGLIGENTLY SET OUT WOULD BE UNCONSTITUTIONAL AND VOID.

All citizens are, by rules of natural justice and by the rules of the common law, entitled to have their property protected from destruction through the negligence of others. And if their property is destroyed through the negligence of others, they are entitled to recover compensation in the form of damages therefor.

To attempt to deprive the citizen of his right of compensation in the form of damages for his property destroyed by fire negligently set out, *would obviously and plainly be an effort to deprive him of his property without due process of law. Such a statute could not be upheld anywhere.*

See as to this and as to the general doctrine touching "due process of law" and "the law of the land."

Cooley's Constitutional Limitations, 3d Ed., *p. 351 to *354.

Authorities are hardly necessary to establish the doctrine that one cannot be constitutionally deprived of his right to recover damages for injuries sustained by him through the negligence of another. A Pennsylvania case, however, is precisely in point. A statute of that state *attempted to limit the extent of damages to be recovered for personal injuries* to three thousand dollars. This was held unconstitutional without hesitation. The court said:

"In Central Railroad of N. J. vs. Cook, A. W. N. C., 319, it was held that a plaintiff can recover the amount of his loss or damage that he pecuniarily suffered or sustained from personal injuries *by reason of the defendant's negligence*, notwithstanding the Act of April 4, 1868, Pamph. L., 58. This case was then pending on error assigned to the ruling of the court below, that the Act of 1868 limited the plaintiff's recovery to a sum not exceeding $3,000, and because of that decision, which was to the very point, it was reversed by agreement of the parties. The argument on part of defendant was ingenious, but we are not convinced that Railroad vs. Cook should be overruled. *Its authority is in conservation of the reserved rights to every man, that for an injury done him in his person, he shall have remedy* BY DUE COURSE OF LAW. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. NOTHING LESS THAN THE FULL AMOUNT OF PECUNIARY

DAMAGE WHICH A MAN SUFFERS FROM AN INJURY TO HIM IN HIS LANDS, GOODS OR PERSON, FILLS THE MEASURE SECURED TO HIM IN THE DECLARATION OF RIGHTS. *As well might it be attempted to defeat the whole remedy as a part;* and with equal propriety could it be declared that in all actions by persons using a railway as a public highway, for damages from injuries to property, the sum recovered shall not exceed $3,000, as for injuries to the plaintiff's person. A limitation of recovery to a sum less than the actual damage is palpably in conflict with the right to remedy BY THE DUE COURSE OF LAW."

Passenger Ry. Co. vs. Boudrou, 92 Pa. St., 481.

True, the amount of damages to be recovered for negligent acts resulting in death may be limited by statute. But that is because the right to recover at all in such cases is given by statute and the legislature may of course regulate the right which it confers.

Cleveland, etc., Ry. Co. vs. Rowan, 66 Pa. St., 393.

In a Michigan case where a statute *attempted to exclude damages to reputation* in cases of libel; and to allow only actual damages such as the person should suffer in respect to his property, business, trade profession, or occupation, the statute was unhesitatingly held void. The court said:

"The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard or produced that intangible but fatal influence which suspicion, helped, by ill will, spreads beyond recall or reach by apology or retraction. Exploded lies are continually reproduced without the antidote, and no one can measure with any accurate standard the precise amount of evil done or probable.

"*There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property.* It is one of those rights, necessary to human society, that underlie the whole social scheme of civilization. * * * It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others; AND IT IS NOT COMPETENT TO AUTHORIZE ANY PERSON, NATURAL OR ARTIFICIAL, TO DO WRONG TO OTHERS WITHOUT ANSWERING FULLY FOR THE WRONG."

Park vs. Free Press Co., 72 Mich., 566-567.

A statute of Wisconsin which attempted to exempt the City of Milwaukee from liability for injuries caused *from negligence* in the

management of its streets and sidewalks, was without hesitation held unconstitutional and void. And that city was held subject to the same liability in damages as other municipalities of the state.

Hincks vs. Milwaukee, 46 Wis., 559.

And so a statute attempting to exempt a city from liability for costs in actions to set aside tax assessments was held unconstitutional and void.

Durke vs. City of Janesville, 28 Mich., 464.

A statute attempting to forfeit logs floating away through the negligence of the owner was held invalid.

Craig vs. Kline, 65 Pa. St., 399.

And so as to statutes attempting to forfeit cattle wandering at large through the mere negligence of the owner.

Rockwell vs. Nearing, 35 N. Y., 302.

Varden vs. Mount, 78 Ky., 86.

Poppen vs. Holmes, 44 Ill., 360

Donovan vs. Vicksburg, 29 Miss., 247.

"*No citizen shall arbitrarily be deprived of his life, liberty or property.* THIS THE LEGISLATURE CANNOT DO, NOR AUTHORIZE TO BE DONE. Due process of law is not confined to judicial proceedings, *but extends to every case which may deprive the citizen of life, liberty or property*, whether the proceeding be judicial, administrative or executive in its nature.

Weimer vs. Bunbury, 30 Mich., 201.

"*This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.*"

Stuart vs. Palmer, 74 N. Y., 183.

It is clear enough then that to attempt to authorize the property of one citizen to be burned up through the negligence of another citizen, without any right to recover damages therefor, would be to deprive the injured citizen of his property without due process of law. A statute of that character would undoubtedly be void.

Other decisions throw some light upon this question. Thus, where property is destroyed as a nuisance, the owner cannot be deprived of his right of action for damages against the officers who destroyed the property. To deny him the right to call in question their acts in such suit for damages would be to deprive him of his property without due process of law, if it was not a nuisance in fact.

Lawton vs. Steele, 152 U. S., 142.

Newark Horse R'y Co. vs. Hunt, 50 N. J. L., 308.

Weller vs. Snover 42 N. J. L., 341.

Morton vs. Steel 119 N. Y., 226.

People vs. Gilson 109 N. Y., 389.

And so even of property used for gaming.

Lowery vs. Rainwater, 70 Mo., 152.

Where an act attempted to deprive the riparian owner of his right to damages suffered by reason of the obstruction of a navigable river by dams, the act was held to be unconstitutional and void. To deny the citizen his damages in such cases is to deprive him of his property without due process of law.

Rhiems vs. Clark, 51 Pa. St., 96.

Gates vs. Milwaukee, 10 Wall., 497

And so an attempt to deprive one of his action for damages against a sheriff for the wrongful seizure of property under process against another, is unconstitutional and void. It was said:

"This statute takes away these rights of the owner *which are in the nature of property*, and substitutes another person, against whom he is required to prosecute his claim. This substitute may be a non-resident and insolvent. *This property right* of the person injured cannot be taken away in the manner attempted by this statute."

Sundberg vs. Babcock, 61 Iowa, 101.

Maisch vs. Littleton, 62 Iowa, 105.

Foule vs. Mann, 53 Iowa, 42.

Craig vs. Fowler, 59 Iowa, 200.

And so an abutting land owner cannot be deprived of his right to use an adjoining street for the purpose of travel or of pasturage without compensation. His right of action for damages cannot be denied.

Lapland vs. N. Mo. R'y Co., 31 Mo., 180.

R'y Co. vs. Munger, 5 Denio, 255.

Woodruff vs. Neal, 28 Conn., 165.

Ames vs. Thomas, 7 Ind., 38.

Trotzman vs. R'y Co., 9 Ind., 469.

R'y Co. vs. O'Daily, 13 Ind., 463.

Crawford vs. Delaware, 7 O., 459.

St. R'y Co. vs. Cumingsville, 14 O., 523.

Imlay vs. Union, etc., R'y Co., 26 Conn., 255.

Ford vs. R'y Co., 14 Wis., 616.

Under the 14th amendment to the federal constitution, the citizen would be entitled to the protection above pointed out against statutes authorizing his property to be burned by negligence, even if the state courts should hold such statutes valid. The Federal Courts dealing with the question would undoubtedly solve it for

themselves, no matter what the decisions of the state courts might be.

There is no doubt that the Federal Courts in many instances are under the most positive obligations to afford protection to the property and rights of the citizen, no matter what the public policy of the state or its declared attempts through statutory enactments may be.

It is submitted with great confidence that this is a case of that character where the Fedaral Courts have an independent duty to perform, and where the citizen must be protected from deprivation and loss of his property through the negligence and wrong of another, no matter what the view of the state courts or state authorties may be in regard to such wrongful and oppressive destruction and loss of property and rights.

VI.

RAILWAYS HELD TO STRINGENT LIABILITY FOR FIRE.

It has often been decided that railway companies, using as they do, the dangerous agencies of steam and fire for the purposes of locomotion, may be required to take additional safeguards for protection of adjoining property from the danger of destruction by fire.

Hart vs. Ry. Co., 3 Metcalf, 99.
Lyman vs. Ry. Co., 4 Cush., 288.
Pratt vs. Ry. Co., 42 Me., 579.
Smith vs. Ry. Co., 63 N. H., 25.
Rodemacher vs. Ry. Co., 41 Iowa, 297.
Ry. Co. vs. De Busk, 12 Col., 294.
20 Pac. Rep., 752.

"The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation *in particulars essential to the preservation of the community from injury.*" (Citing authorities).

N. Y. & N. E. Ry. Co. vs. Bristol, 151 U. S., 567.

Statutes making railway companies absolutely liable for damages caused by fires set out by locomotives are constitutional and are upheld and enforced by the courts.

U. P. Ry. Co. vs. Arthur, (Col.) 29 Pac. Rep., 1021.
Matthews vs. Ry. Co. (Mo.) 9, A. R. R. & C. Rep. 441.
McCandless vs. Ry. Co. (S. C.) 7, A. R. R. & C. Rep., 366.
Lyman vs. Ry. Co., 4 Cush., 288.

Regan vs. Ry. Co., 60 Conn., 124.
Same case 22 Atl., Rep., 503.
Martin vs. R'y Co., 62 Conn., 331.
Same case, 25 Atl., Rep., 239.
And see Mo. Pac. R'y Co. vs. Mackey, 127 U. S., 205.
Minn. & St. L. R'y Co., vs. Herrick, 127, U. S., 210.

Statutes will be found everywhere holding railway companies to a stricter liability for setting out fires than that imposed by the common law rules of negligence.

But no statutes can be found anywhere which attempt to exempt railway companies from liability for damages for fires negligently set out by their locomotives.

The conclusion is irresistible *of a general and universal public policy against permitting fires to be set out by railways in the operation of their trains*, and against exempting railways from liability for such fires when set out by them. The dangerous agencies necessarily made use of by railways are recognized and well known and no premium is offered anywhere for negligence in the use of these dangerous agencies.

"The hazardous character of the business of operating a railway would seem to call for special legislation with respect of railway corporations, having for its object the protection of their employes as well as *the safety of the public*."

Mo. Pac. R'y Co. vs. Mackey, 127 U. S., 210.

VII.

STATUTES AND DECISIONS OF IOWA RELATIVE TO FIRES NEGLIGENTLY SET OUT BY RAILROADS.

It is provided by Section 1289 of the Code of Iowa, being Section 1972 of McClain's Annotated Code of 1888:

"That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway."

Under this positive statute, if the decisions already cited from Colorado, Missouri, South Carolina, Massachusetts and Connecticut had been followed, railway companies in Iowa would have been held *absolutely liable* for any fires which they might set out in the operation of their railways or trains. But the Supreme Court of Iowa construed the statute more leniently than the distinguished courts of the other states referred to, and held that it did not make the railways

absolutely liable for damages from fires set out, but made the fact of the fire *prima facie* proof of negligence on the part of the railway, which might be rebutted by it by showing freedom from negligence.

Small vs. C., R. I. & P. Ry. Co., 50 Iowa, 338.
Slossen vs. B., C. R. & N. Ry. Co., 51 Iowa, 295.
Libby vs. C., R. I. & P. Ry. Co., 54 Iowa, 92.
Rose vs. C. & N. W. Ry. Co, 72 Iowa, 625.

Under the statute, however, it is not necessary to charge the railway company with negligence in a petition to recover damages for a fire set out by it. The simple fact that a fire is set by a locomotive makes a *prima facie* case against the company.

Engle vs. C., M. & St. P. Ry. Co., 77 Iowa, 661.
Babcock vs. C. & N. W. Ry. Co., 62 Iowa, 593.
Seska vs. Ry. Co., 77 Iowa, 137.

This statute has been expressly held to be constitutional.

Rodemacher vs. Ry. Co., 44 Iowa, 297.

And it is settled in Iowa that under this statute the contributory negligence of the injured party is no defense in case of fire set out by the railway company.

West vs. C. & N. W. Ry. Co., 77 Iowa, 655.
Engle vs. C., M. & St. P. Ry. Co., 77 Iowa, 661.

Before the enactment of the statute, in order to recover, the injured party was not only required to prove the fact that the railway company set the fire, but was also required to prove that it was set out by reason of negligence on the part of the railway company.

Gandy vs. R'y Co., 30 Iowa, 420.
McCummons vs. R'y Co., 33 Iowa, 187.
Garrett vs. R'y Co., 36 Iowa, 121.

That this rule was changed by statute certainly shows that it is the settled public policy of Iowa to protect its citizens as far as possible from loss or damage by fires set out by railway companies in using the dangerous elements of fire and steam.

Under the latest decisions of the Supreme Court of Iowa, railway companies are held to a very stringent degree of liability if it is shown that fires are set out by them.

"It may be thought that the rule devolves upon railway companies nearly, if not quite, an impossibility of proof in such cases. But that fact cannot change the result."

Greenfield vs. Ry. Co., 83 Iowa, 274-5.
See also Hamilton vs. Ry. Co., 84 Iowa, 132.

Babcock vs. Ry. Co., 62 Iowa, 593.

Same case, 72 Iowa, 107.

Public policy of Iowa is therefore clearly against allowing railway companies to set out fires negligently, or to escape liability for fires so set out.

VIII.

GENERAL STATUTORY REGULATIONS AS TO FIRES IN IOWA.

That the prevention of fires is a matter of great public concern, and that whatever tends to the negligent setting out and escape of fires in Iowa is contrary to manifest public policy, is shown by numerous statutory regulations in addition to the statute above quoted, relating to fires set out by railway companies.

In referring to these statutory regulations we shall, as a matter of convenience, give the numbers of sections found in McClain's Annotated Code of 1888.

City councils are authorized to establish and organize fire companies. Code, sections 723 and 920.

Members of such fire companies are exempt from military duty, from the payment of poll taxes, and from jury service. Code, sections 2432 to 2435.

The destruction or removal of any apparatus of a fire company is punished. Code, sections 2436-7.

The malicious injury to the apparatus of any such fire company is a crime. Code, section 5286.

Cities and towns are authorized to establish fire limits within their respective limits; and to prohibit therein the erection of any building unless the outer walls be made of brick and mortar, or of iron and stone and mortar. Code, sections 616 and 818.

Boards of public works may require the erection of non-combustible buildings. Code, section 895.

And such board may regulate the size, number and manner of construction of fire escapes on public and semj-public buildings. Code, section 897.

Cities may by ordinance regulate and control the construction of chimneys, stacks, flues, fireplaces, hearths, stovepipes, ovens, boilers and heating apparatus. And require and regulate the construction of fire escapes. Code, section 734.

They are authorized to regulate manufactories which are dangerous in causing or promoting fires, to prevent the deposit of ashes and

combustible matter in unsafe places, and to cause all such places or enclosures as may be in a dangerous or unsafe state, to be put in a safe condition. Code, section 735.

They are authorized to regulate the use of lights in stables, shops and other places, and the building of bonfires, and to regulate or prohibit the use of fireworks, firecrackers, torpedoes, roman candles, and other pyrotechnic displays. Code, section 736.

They are anthorized to provide for the inspection of steam boilers, and all places used for the storage of explosive or inflammable materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, and to assess the cost and expense of such proceedings against the property and owners thereof. Code, section 737.

Giving a false alarm of fire is punished, whether this is done without cause, or by setting fire to any combustible material. Code, section 2438.

Of course the intentional firing and burning of the property of another is punished as a crime by stringent statutory provisions. Code, sections 5179 to 5187.

In addition to this it is provided:

"If any person wilfully, *or without using proper caution*, set fire to and burn, or cause to be burned, any prairie or timber land, or any enclosed or cultivated field, or any highway, by which the property of another is injured or destroyed, he shall be fined not exceeding $500, or imprisoned in the county jail not more than one year." Code, section 5188.

Thus it is made a crime under this statute to set out a fire negligently, i. e., without using proper caution, as to the particular kind of property and particular places mentioned therein. If, therefore, a railway company without using proper caution, that is, negligently, had set fire to a prairie, highway, timber land, or cultivated field, and the fire had spread therefrom and burned the warehouse in controversy in this suit, that would be a crime, and the railway company would be necessarily civilly liable in damages. Obviously, it could not contract to shield itself from liability for negligence under such circumstances.

Yet this is what the contract involved in this case attempts to do.

It is further provided by statute:

"If any person set fire to or burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control,

between the first day of September in any year and the first day of May following, he shall be guilty of the misdemeanor," etc. Code, section 5189.

Under this section of the Code, the Supreme Court of Iowa has held without hesitation, that a citizen setting out a fire and allowing it to escape from his control is liable for damages thereby incurred, irrespective of any question of negligence on his part. The liability is complete from the fact of setting out the fire during the prohibited time, and the injury done to another thereby. Herein the citizen by the decisions of the Supreme Court of Iowa construing these statutes, seems to be held to a stricter liability than a railway company. As to this see

Conn vs. May, 36 Iowa, 241.

McKenna vs. Baessler, 86 Iowa, 198.

In the last case cited so strict is the liability maintained against the citizen that he is held liable for property destroyed, not by the fire set out by himself, but by a back fire set out by another for the purpose of escaping injury from fire set out by the original wrong doer.

In addition to other precautions and safeguards against fires, cities and towns have power to authorize the erection of water works. Code, section 640.

And to levy a special tax for the maintenance of such water works, *which tax must be exclusively on property within the limits receiving fire protection therefrom.* Code, section 643.

And in order to secure the protection from fire by water works, cities may issue and sell bonds to pay the expense thereof. Code, section 793.

When a building is set fire to, the fire may spread therefrom and consume a whole city or town. Of what avail is it to authorize cities and towns to establish water works and fire companies to fight fires, and to enact this careful system of statutes to protect against fires, if all may be rendered nugatory and unavailing by allowing a railway company to set fires negligently, thus removing one of the principal safeguards for the protection of the public? It is no answer to say that the company would be liable except where especially exempt by contract. There would still remain the necessity of proving that the railway set the fire in fact, and the necessity of a multitude of suits to recover compensation on the part of the various prop-

erty owners. There would remain the danger of loss of life from wholesale conflagrations started in this manner.

Besides, if railway companies may contract to exempt themselves from liability for fires set out negligently, it is evident that all others may do so in like manner. Thus all manufacturing establishments may contract with adjacent lot owners for exemption from damages for fires which they may negligently set out, and all citizens engaged in carrying on paint shops and other like classes of business where the hazard from fire is great, may contract for the like exemption from liability.

If this may be done it is easy to see that the hazard from fires will be very greatly increased so far as the general public are concerned, in spite of all efforts which may be made by statutory enactments, and by organizations under such statutory enactments, to repress the breaking loose of this dangerous element.

From these considerations alone it is difficult to see how the Supreme Court of Iowa could have come to any different conclusion from that they announced when they declared a contract of this kind on the part of a railway company contrary to public policy and absolutely void, saying in the first decision of the Griswold case:

"Railway corporations are *quasi* public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. Railroad Co. vs. Ryan, 11 Kan., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. Thomas vs. Railway Co.; 101 U. S., 71.

"Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipment, including locomotive engines, and of operating its road without negligence."

Griswold vs. Ill. Cent. R. Co., 53 N. W. Rep, 297.

IX.

FEDERAL COURTS MUST DECIDE THE QUESTION OF PUBLIC POLICY FOR THEMSELVES, AND ARE NOT BOUND BY DECISIONS OF STATE COURTS.

What is public policy? The following are some of the definitions given by the authorities:

"By public policy is intended that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed the policy of law, or public policy in relation to the administration of the law."

Greenhood, Public Policy, 2.

Egerton vs. Earl Brownlow, 4 H. L. Cas., 196.

"Public policy is that principle of law which holds that no subject or citizen, can lawfully do that which has a tendency to be injurious to the public, or against the public good."

People vs. Chicago Gas Trust, 1 Am. R. R. & Cor. Rep., 575.

"Whatever is injurious to the public is void, on the ground of public policy."

Craft vs. McConnough, 79 Ill., 346.

"Public policy is synonymous with the public welfare, and the public welfare requires that the public health, justice, morals, trade and peace be kept inviolate. Whatever is injurious to these great interests which society cherishes and laws are formed to promote, is contrary to public policy and void."

29 Central L. Journal, 309.

QUESTIONS OF PUBLIC POLICY.

Where the state courts of Mississippi held that notes given for the value of slaves as merchandise were contrary to public policy and void, *as indicated by the constitution of that state*, this court refused to follow this decision and said:

"When the sale of the slaves in question was made there was certainly no *fixed and settled course of policy* which would make void or illegal such contracts."

Groves vs. Slaughter, 15 Pet., 503.

In a subsequent case involving the same question this doctrine was reiterated in an opinion by Mr. Chief Justice Taney; and it was said as to following the decisions of the state courts:

"But we ought not to give them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states which in the judgment of this court were lawfully made. For if such a rule were adopted and the comity due to state decisions pushed to this extent it is evident that the provision in the constitution of the United States which secures to the citizens of another

state the right to sue in the courts of the United States might become utterly useless and nugatory."

Rowan vs. Runnells, 5 How., 134.

Afterwards it was held that the same doctrine applied to contracts between citizens of the same state, and that non-residence was not necessary to entitle the federal courts to exercise an independent judgment.

O. Ins. Co. vs. Debolt, 16 How., 432.

The state courts held contracts payable in confederate money to be contrary to public policy and void.

Delmas vs. Ins. Co., 14 Wall., 667.
Bank vs. Bank, 13 Wall., 432
Same Case, 14 Wall., 9.
Bethel vs. Demaret, 10 Wall, 537.

The federal courts refused to follow these decisions, but determined for themselves that such contracts were not contrary to public policy, were valid and would be upheld.

Thorington vs. Smith, 8 Wall, 1.
Planters Bank vs. Union Bank, 16 Wall., 483.
Confederate Note Case, 19 Wall., 548.
Wilmington R. R. vs. King, 91 U. S., 3.
Cook vs. Lillo, 103 U. S., 792.

"But as we have already said, this is not a class of questions in which we are bound to follow the state courts. It is not based on a statute of the state or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become the settled rule of property, *but on those principles of* PUBLIC POLICY *designed for the protection of the state or the public, of which we must judge for ourselves*, as they do when the question is fairly presented."

Delmas vs. Ins Co., 14 Wall., 667.
Tarver vs Keach, 15 Wall., 67.

So, certain of the state courts after the civil war, held that notes given for the purchase of slaves, were contrary to public policy and void.

Palmer vs. Marston, 14 Wall., 10.

The federal courts exercising an independent judgment and refusing to follow such decisions held that contracts of this character were not contrary to public policy and were valid.

Osborn vs. Nicholson, 13 Wall., 654.
White vs Hart, 13 Wall., 646.

"In deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views AND HAVE SO RECENTLY AND WITH SUCH SLIGHT PREPONDERENCY OF JUDICIAL SUFFRAGE come to the conclusions that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law."

R'y Co. vs. Lockwood, 17 Wall., 368.

Liverpool vs. Phœnix Co., 129 U. S., 443.

And where a suit was on a promisory note which the state courts held contrary to public policy and void, this court refused to follow such decisions, and held the contract valid, expressly holding that *where questions of public policy were involved it would decide the question for itself.*

Boyce vs. Tab, 18 Wall., 548.

Necessarily this is so. Take the case of Gibbs vs. Baltimore Gas Co. The contract held invalid related merely to furnishing gas to the people of Baltimore, and was strictly a Maryland contract. Suppose the Supreme Court of that state had held such contracts to be unobjectional and valid. Can it be claimed or pretended that the federal courts would not have determined for themselves the principles of public policy, public law, and public morals thus involved?

So take the case of Marshall vs. Baltimore & Ohio R'y Co., 16 How., 330. That was where the plaintiff sued for services *in procuring legislation in Virginia.* Suppose the Supreme Court of Virginia had held contracts of that character to be unobjectionable. Would the federal courts in that jurisdiction thereupon sustain lobbying contracts, made in Virginia for the purpose of influencing legislation in that state? Would not the federal courts maintain their own standard of public morals and public policy involved in that question?

So take the matter referred to by Justice Grier in his opinion in that case, when he says:

"Persons entering into the marriage relation should be free from extraneous or deceptive influence; hence the law avoids all contracts to pay money for procuring a marriage."

Suppose a contract of this character made in Virginia, between citizens of Virginia, were sustained by the courts of that state. Would the federal courts follow such a decision and hold such a contract to be valid?

Take the case of a note given by a bankrupt, under state laws, upon a secret compromise with one of his creditors, referred to in Bank vs. Owens, 2 Pet., 540. Suppose the state court sustained such a compromise as that, would the federal courts any the less hesitate to hold the contract contrary to public policy and void?

Take the cases of agreements to pay for suppressing evidence and compounding felonies, given in Trist vs. Child, 21 Wall., 449; Collins vs. Blaten, 2 Wilson, 347. Suppose the state courts where such contracts were made, held them to be unobjectionable, and suppose contracts originally made in such a state, between citizens of such a state, came into the federal courts by reason of change of residence of one of the parties to the contracts, would the federal courts become mere instruments for registering decrees of the state courts on these questions, or would they, upon grounds of their own, unhesitatingly declare such contracts to be contrary to public policy and void?

Holding a contract void which the courts of New York held to be valid, this court said:

"On this subject, as on any question depending upon mercantile law and not upon any local statute or usage, it is well settled that the courts of the United States are not bound by the decisions of the courts of the state, but will exercise their own judgment even when their jurisdiction attaches only by reason of the citizenship of the parties in an action at law, of which the courts of the state have concurrent jurisdiction, AND UPON A CONTRACT MADE AND TO BE PERFORMED WITHIN THE STATE."

Liverpool Co. vs. Phœnix Co., 129 U. S., 443.

As to the construction of state constitutions, it is settled law that whether, within the meaning of such constitutions, a use is a public or a private use, is a question of general jurisprudence, not of constitutional construction, and hence the decisions of the state courts on that point are not conclusive on federal courts, but are only entitled to the weight of any other able tribunals.

Hager vs. Reclamation, etc., Co., 111 U. S., 704.

Louisville, etc., R'y Co. vs. Palmes, 109 U. S., 244.

Lavin vs. Am. Savings Bank, 18 Blatch, 13.

Butz vs. Muscatine, 8 Wall., 575.

That the federal courts are not bound by the decisions of the state courts on contracts of either public or private carriage, or question of commercial law, is thoroughly well settled.

Liverpool vs. Phœnix Co., 129 U. S., 443.
Carpenter vs. Ins. Co., 16 Pet., 511.
Swift vs. Tyson, 16 Pet., 18.

"What constitutes a question of carriage is not a question of local law upon which the decisions of a state court must control. It is a matter of general law on which this court will exercise its own judgment."

Myrick vs. Mich. Central R'y Co., 107 U. S., 109, citing.
Chicago vs. Robbins, 2 Black, 418.
R'y Co. vs. Nat'l Bank, 102 U. S., 14.
Hough vs. R'y Co., 100 U. S., 213.

Cases which show conclusively that the courts of the United States determine the common law for themselves, regardless of the decisions of state courts, are those which hold that contributory negligence is a matter of defense which must be pleaded and proved by the defendant, although the decisions of the state courts may hold that the plaintiff must aver and prove due care. These cases are,

Ry. Co. vs. Gladmon, 15 Wall., 401.
Ry. Co. vs. Horst, 93 U. S., 291.
Hough vs. Ry. Co., 100 U. S., 213–225.
Ry. Co. vs. Maris, 123 U. S., 710, 720–1.
Coaching Co. vs. Tallson, 139 U. S., 551–557.
Ry. Co. vs. Voke, 151 U. S., 77.

Questions "affecting the liability of a railway corporation as a common carrier of goods or passengers, such as its right to contract for exemption from liability for its own negligence, or its liability beyond its own line, or its liability to one of its own servants for an act of another person in its employment, are questions not of local law, but of GENERAL JURISPRUDENCE, upon which this court in the absence of an express statute regulating the subject WILL EXERCISE ITS OWN JUDGMENT uncontrolled by the decisions of the courts of the several states."

Lake Shore Co. vs. Prentiss, 147 U. S., 106.

Said Mr. Justice Brewer:

"The question of the responsibility of a railway company for injuries caused to or BY its servants is one of general law.

"It does not spring from any local usage or custom. There is in it no rule of property. But it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the common law."

Ry. Co. vs. Baugh, 149 U. S., 370, 373, 374, 376, 378.

The effect of this very decision was for the federal courts to refuse to follow the decisions of the state courts of Ohio on a question of public policy as declared by the state courts.

Ry. Co. vs. Spangler, 44 O. St., 476.

"It is true that the federal courts must always determine for themselves all common law questions, or questions sometimes called those of general jurisprudence or of general law."

Foxcroft vs. Mallet, 41 How., 353.

Carpenter vs. Ins. Co., 16 Pet., 511.

Manhattan Co. vs. Broughton, 109 U. S., 126.

Louisville vs. Palmes, 109 U. S., 256.

Gibson vs. Lyon, 115 U. S., 446.

"Where private rights are to be determined by the application of common law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decision."

Chicago vs. Robbins, 2 Black, 418.

And see,

Smith vs. Ala., 124 U. S., 478.

Oates vs. Bank, 100 U. S., 239.

Pana vs. Bowler, 107 U. S., 529.

"Federal courts are not bound by the decisions of state courts construing a state statute, or even holding one of their own statutes void, if the reason for holding such statute void is one of general law or founded on common law principles as to which the federal courts differ from the state courts."

Alcott vs. Supervisors, 16 Wall, 689.

Township of Pine Grove vs. Talcott, 19 Wall, 677.

Pleasant Township vs. Etna Co., 38 U. S., 70-72.

Nor are the federal courts concluded by the decisions of the state courts first made after a contract is entered into, *or made after a suit is pending in the federal courts.* In a case where these matters were given the greatest consideration, it was said:

"We do not consider ourselves bound to follow the decisions of the state court in this case. When the transactions in controversy occurred, and when the case was under consideration in the Circuit Court, no construction of the statute had been given by the state tribunals contrary to that given by the Circuit Court. * * * IT CAN HARDLY BE CONTENDED THAT THE FEDERAL COURT WAS TO WAIT FOR

THE STATE COURT TO DECIDE THE MERITS OF THE CONTROVERSY AND THEN SIMPLY REGISTER THEIR DECISION."

Burgess vs. Seligman, 107 U. S., 20-35.

See also,

Clark vs. Bever, 139 U. S., 116.
Carroll Co. vs. Smith, 111 U. S., 562.
Anderson vs. Santa Anna, 116 U. S., 365.
Boeles vs. Brimfield, 120 U. S., 762.

"When contracts and transactions have been entered into, and rights have accrued thereon, in the absence of any authoritative decision by the state courts, the courts of the United States properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpetation may be adopted by the state courts after such rights have accrued."

Ry. Co. vs. Doe, 114 U. S., 352.
Buncomb Co. vs. Tommey 115 U. S., 127.
Ober vs. Callaghan, 93 U. S., 207.
Commissioners vs. Thayer, 94 U. S., 642.
Mohr vs. Mannierre, 101 U. S., 421.
Butz vs. Muscatine, 8 Well., 582.
Town of Venice vs. Murdough, 92 U. S., 501.
Ry. Co. vs. Wiggins Ferry Co., 119 U. S., 623.
Anderson vs. Santa Anna, 116 U. S., 365.
Bowles vs. Brimfield, 120 U. S., 762.
Ry. Co. vs. Doe, 114 U. S., 352.
Liverpool Co. vs. Phenix Co., 129 U. S., 443.
Ry. Co. vs. Lockwood, 17 Wallace, 368.
Delmas vs. Insurance Co., 14 Wallace, 667.

And see also decisions cited in opinion of Court of Appeals on this question, Record, p. 38.

No doubt, as suggested by Judge Caldwell in his opinion, "It was the hope that this court would overrule the decisions of the Supreme Court of Iowa in a similar case that caused the removal of this case into the Circuit Court," *by the defendant in error.* In other words, the defendant in error was then seeking to escape from the first decision of the Iowa Supreme Court in the Griswold case, and it cannot now invoke as binding upon the Federal Courts, the final decision in that case, made while this litigation was pending in the tribunal into which it had removed it.

X.

THE DEFENDANT SHOULD BE HELD LIABLE.

From these considerations it is difficult to see how the Supreme Court of Iowa could have come to any different conclusion from that they originally announced when they declared a contract of this kind on the part of a railway company contrary to public policy and absolutely void, saying:

"Railway corporations are *quasi* public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. Railroad Co. vs. Ryan, 11 Kan., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. Thomas vs. Railway Co. 101 U. S., 71.

"Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipment, including locomotive engines, and of operating its road without negligence."

Griswold vs. Ill. Cent. R. Co., 53 N. W. Rep., 297.

The foregoing decision was announced by the Supreme Court of Iowa, October 19, 1892, as shown by the report of the case above cited. While this decision was in force, and on the 11th day of November, 1892, the fire occurred which caused the damage complained of in the case at bar. At this time the plaintiff insurance companies were authorized to rely upon the decision above cited, and to believe that if a fire occurred through the negligence of the railway company it would be liable over to them for any insurance they were required to pay upon the warehouse and its contents, notwithstanding the provision in the lease attempting to exempt the railway company from liability for such fire. It does not appear when the policies in suit were issued. But the right of cancellation existed, and the insurance companies may well have kept these policies in force relying upon the decision in this Griswold case for protection against the negligence of the railway company.

On rehearing, by a bare majority of three judges, the contract in the Griswold case was finally maintained. What seems have had the greatest weight with the majority of the court was the op-

portunity of beating an insurance company. It was said at the conclusion of the opinion:

"Surely public policy does not demand that the defendant shall now reimburse these insurance companies for the payments they were bound to make by their own contracts, and which the defendant has never promised to pay."

Griswold vs. R'y Co., 57 N. W. Rep., 844, 846.

Same case, 90 Iowa, 265.

But see dissenting opinion of Mr. Justice Robinson.

To this reasoning in regard to insurance companies, it may be said that their contract did not contemplate the destruction of the insured property by the wrongful intervention of a third party; and if a third party did wrongfully burn up the property, either willfully or by negligence, then by every principle of law and public policy he is bound to respond and make good the injuries which he has inflicted. It will not do to allow him to escape merely because he has inflicted such injuries upon an insurance company. The insurance company is entitled to the same protection as the rest of the general public as against the tortious conduct of a stranger to its contract of insurance, who destroys the property which it has insured, and in which it has thus acquired a qualified property interest.

On the final decision by the Supreme Court of Iowa, Mr. Justice Robinson in his dissenting opinion, speaking of the lease, said:

"*It is clear that its purpose on the part of the defendant* (railway company) *was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement.* Elevators, coal sheds and lumber yards are important aids to a railway engaged in carrying grain, coal and lumber, in securing and transacting that branch of its business. * * * In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided to the extent to which it patronized them."

Griswold vs. Ry. Co., 57 N. W. Rep., 847.

90 Iowa, 265.

It was along this line of reasoning that the railway was originally held liable. Although overruled on the final decision by a bare majority of the court, the force and cogency of this reasoning is nonetheless undeniable.

CONFLICT OF OPINION AMONG FEDERAL JUDGES.

A conflict of opinion will be found among the learned and distinguished judges who passed upon the questions involved in this case in the court below.

His Honor, Judge Shiras, who decided the case at circuit, held in his opinion on the demurrer, that he was bound by the final decision of the State Court in the Griswold case; that even if a contract of this character when made would be invalid under the decisions of the State Courts, but was valid by reason of a change in such decisions at the time it was sought to be enforced, the Federal Courts would follow the last decision and enforce such contract; referring to the Griswold case, in the last sentence of his opinion, he says: "And, relying upon that decision, I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire is not NOW contrary to the public policy of the State of Iowa, and hence is not invalid." (Record, 26).

In the Court of Appeals, Judge Caldwell refused to join in the affirmance of the judgment below, except upon the express ground that the Federal Courts were bound by the decision in the Griswold case. As to the validity of the exemption in the lease as an original proposition, he said, in the last clause of his dissenting opinion: "*The question as presented by this record is not free from doubt.* It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case." (Record, 44).

Judges Sanborn and Thayer held that they were not bound by the decision in the Griswold case, but sustained the exemption from liability for negligence contained in the lease as the same was specially set up by the defendant in error. This conclusion was arrived at upon the ground substantially, that the defendant in error:

"Was apparently willing to discharge all the duties it owed to the public, and to every individual of the public, and it did not undertake by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right-of-way to these lessees or to anyone else, nor had they or any one any right to the use of the leased premises before this lease was made." (Record, 39).

"But the law imposes no duty upon a railroad company to lease its right-of-way or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission." (Record, 40).

"But the defendant in error and Simpson, McIntire & Co. did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute or to refuse to execute the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire, set by the negligence of the company, relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden which it had the option to take or to refuse." (Record, 48.)

"There is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Co. to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid." (Record, 48.)

It is respectfully submitted that this line of reasoning does not dispose of the real questions involved. A railway company having failed to furnish needed stational facilities in the form of warehouses and elevators, and having thus compelled its patrons to furnish them under what is in form a lease, but in reality a mere license, should hardly be permitted to deny that it was either bound to furnish them for itself, or through its patrons and the public.

Neither do its patrons stand upon an equal footing with the railway company. While it is true that the company has no monopoly of land in Iowa, yet a warehouse or elevator, in order to furnish the requisite facilities and conveniences to the public which the railway company ought to furnish, must be located upon the right-of-way of the railway company, or so nearly adjacent thereto that it may be reached by a spur track or side track. Now if a patron should erect such a warehouse or elevator upon his own ground immediately adjoining the station grounds of the railway, the latter might still refuse to build or even operate a spur track or side track with reference to such elevator or warehouse, unless it was exempted from liability for burning the same and its contents by negligence, by a

provision in a contract precisely similar to that inserted in the lease in controversy.

Thus it will be seen that the patrons of railways have no real freedom of choice in these matters. They must have elevators and cold storage warehouses somewhere in order to carry on a vast volume of commerce over the railways. These facilities when furnished by themselves will still be of no practical use or benefit unless the railway tracks are laid down to and past them. The railways may refuse such tracks unless exempted from liability for their own negligence in operating them. Wherever, therefore, the patron builds these warehouses, whether on his own grounds or on the grounds of the railway company, he may still be compelled to submit to the conditions contained in these leases, or he cannot secure side tracks from any common carrier or any railway company anywhere. What freedom of choice has the shipper or the public in dealing with railway companies under such circumstances?

How can it fairly be said that this course of proceeding has "relieved the company from no duty it was required by law to perform, but simply provided that it should not assume an additional burden which it had the option to take or refuse." In reason and justice it should not have the option to take or refuse the responsibility of furnishing these stational facilities in some form; nor of being exempt from liability for negligence and carelessness in destroying them and their contents after refusing to furnish them itself.

If, as held by the Court of Appeals, the railway company may employ others to furnish warehouses and elevators, and stipulate that such others shall hold the companies harmless from any damage to such property and contents, from fires caused by the negligent operation of the railroad, then all that a company will need to do will be to have some pecuniarily irresponsible employe furnish warehouses in form, which it may build itself in fact, and thus escape from all duty and obligation to exercise diligence not to destroy the property of its patrons therein for shipment, or for delivery to a consignee.

XI.

We shall not attempt to review the authorities relied upon by defendant in error in the courts below, and which will no doubt be relied upon in this court.

In the main they are answered by the authorities which we

have submitted supra, and incidentally they are discussed from our point of view, in what we have already said.

1. The argument that because the negligence of the insured is not a defense to a policy of insurance for which he has paid, a railway company may contract for the right to burn the property of its patrons by negligence is clearly a non-sequitur

It is true that a railway company may make a valid stipulation that it shall be entitled to the benefit of any insurance which there may be upon property transported by it, and which is destroyed by its own negligence.

Providence Ins. Co. vs. Morse, 150 U. S., 99.

Phœnix Ins. Co. vs. Western Transportation Co., 117 U.S., 312.

But a railway company cannot make a valid stipulation which will *compel a shipper* to secure such insurance for its benefit, and thus indemnify itself against its own carelessness at the shipper's expense.

"The question raised is, will the courts compel the performance of a contract between shipper and carrier *requiring the shipper to protect the carrier against the consequences of its own negligence?* There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose; but the question here presented is, *can he compel the shipper to insure the goods for his benefit?* If so, he can compel the shipper to release him entirely and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employes. *This in the language of the English courts would be unjust and unreasonable. In the language of our own cases it would be contrary to public policy.*"

Willock vs. Pa. R'y Co., 166 Pa. St., 192.

2. As to the express messenger case, and the circus train case being

Bates vs. Ry., 147 Mass., 265.

C. M. & St. P. Ry. Co. vs. Wallace, 14 C. C. Appl., 257.

and other like cases, counsel for the defendant in error point out the grounds upon which these cases go as follows:

"The principle is thus stated:

A common carrier may undoubtedly become a private carrier or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

R. R. Co. vs. Lockwood, 17 Wall., 377.
Liverpool, &c., Co. vs. Ins. Co., 129 U. S., 440.
Hutchinson on Carriers, 2d Ed. Secs. 44 and 73.

"If a railway company can carry an express messenger, or a circus train over its road, *as a private* and not as *a public carrier*, etc."

The answer to this is, that in furnishing elevators and cold storage warehouses a railway company is simply supplying the public with facilities which, AS A COMMON CARRIER, it is under an imperative duty to afford its patrons. These facilities are as much a part of its necessary equipment *as a common carrier*, as locomotives and freight cars.

Hence, if it neglects that plain duty, it cannot as a common carrier pile Pelion on Ossa, heap negligence on negligence, and then contract that it shall not be liable for negligence at all, because it has shouldered off on the public a part of the duties which it owes to the public, and as to which shippers and patrons are entitled to protection from the negligence of the common carrier, no matter by what instrumentalities it handles the vast commerce in grain and perishable foods, from which it derives enormous revenues. The western railway which did not secure its share of this vast commerce and revenue, would soon cease to earn enough to pay operating expenses and fixed charges. The doctrine of putting off the character of common carrier, and becoming a mere private carrier, or contracting in that character does not apply here.

Respectfully submitted,

CHAS. A. CLARK,
R. W. BARGER,
For Plaintiffs in Error.

[redacted]

[redacted]

HARTFORD FIRE INSURANCE COMPANY, ET AL.,
Plaintiffs in Error,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

OPINION IN
GRISWOLD vs. ILLINOIS CENTRAL RAILROAD COMPANY,
38 N. W. Reporter 305, and same case in 37 N. W. Reporter 466.

STATUTES OF IOWA AFFECTING LIABILITY OF RAILWAY COMPANIES FOR FIRES.

E. W. MAGEE AND
CHARLES A. CLARK,
Counsel for Plaintiffs in Error.

[redacted]

Supreme Court of the United States,

OCTOBER TERM, A. D. 1897.

No. 115.

HARTFORD FIRE INSURANCE COMPANY ET AL.,
Plaintiffs in Error,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

OPINION IN
GRISWOLD vs. ILLINOIS CENTRAL RAILROAD COMPANY,
53 N. W. REPORTER, 295, AND SAME CASE 57 N. W. REPORTER, 843.

STATUTES OF IOWA AFFECTING LIABILITY OF RAILWAY COMPANIES FOR FIRES.

R. W. BARGER AND
CHARLES A. CLARK,
Counsel for Plaintiffs in Error.

OPINION IN

GRISWOLD ET AL. VS. ILLINOIS CENTRAL RAILROAD COMPANY.

53 N. W. REPORTER, 295.

(Supreme Court of Iowa, October 19, 1892).

RAILROAD COMPANY—NEGLIGENCE—FIRES SET BY ENGINE—CONTRACT EXEMPTING COMPANY FROM LIABILITY—VALIDITY.

Code, § 1289, provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railway;" and section 1308 provides that a common carrier cannot exempt itself from liability as such carrier by contract. Held, that a contract between the owner and operator of an elevator, coal shed, and corncribs, and a railroad company, exempting such company from liability for damages by fire negligently set by its engines, is void, where it appears that such buildings were built and used for the purpose of promoting the business of such railroad company.

Appeal from district court, Buchanan county; J. L. Husted, Judge.

Action to recover damages for the loss of an elevator by fire, alleged to have been caused by negligence on the part of defendant. A demurrer to the answer was overruled. The plaintiffs electing to stand on their demurrer, judgment was rendered against them for costs, and they appeal.

R. W. Barger and E. E. Hasner, for appellants. W. J. Knight, for appellee.

ROBINSON C. J.:

The facts disclosed by the pleadings, which are material for consideration on this appeal, are substantially as follows: On the 30th day of April, 1890, the plaintiff Griswold owned a two and one-half story elevator building, warehouse, and corncrib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named the property described was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the value of $6,000, and was at the time insured by the plaintiffs, the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company, in the sum of $1,000 each, or for the aggregate amount of $4,000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and claiming that, by reason of such payments, they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions: "And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the

said lessor, as rent for said described premises, the sum of one dollar, to be paid at the time and in the manner following, to wit, on the delivery of this lease: and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good substantial elevator, coal sheds, and lumber yard on the above-described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad; and the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question.

The ground of the demurrer is as follows: "The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employes. The plaintiffs, therefore, say it is against public policy, and contrary to the statutes of

Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employes, and servants; and that said defense, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void." No special claims are made in behalf of the insurance companies; therefore their interests, and that of Griswold, for the purposes of this appeal, will be treated as governed by the same rules.

1. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. * * *" It was said in West v. Railway Co., 77 Iowa, 654, 35 N. W. Rep., 479, and 42 N. W. Rep., 512, that this statute imposes an absolute liability upon railroad corporations, without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes, without fault on its part, is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway.

Section 1308 of the Code provides, in effect, that a common carrier, or carrier of passengers, cannot exempt itself from liability as such carrier by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence, in transporting passengers or freight, by contracts made in advance

of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in Cooley, Torts, 687, with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

In Johnson's Adm'x v. Railroad Co., (Va.), 11 S. E. Rep., 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to or death of any of the members of the said firm, or of any of its agents or employes, sustained from said work, should such death or injury occur, from any cause whatsoever." The court in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done, where an en-

lightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are quasi public agencies, and perform a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. Railroad Co. v. Ryan, 11 Kan., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. Thomas v. Railroad Co., 101 U. S., 71.

Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with sale equipments, including locomotive engines, and of operating its road without negligence. That is a duty which it owes to the public, and any agreement which seeks to lessen the diligence and care with which it furnishes and operates its road is to that extent against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into

the agreement. Elevators, coal sheds, and lumber yards are important aids to a railway engaged in carrying grain, coal, and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal, and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt the controlling considerations which induced it to execute the lease. Those improvements were not only of value to defendant, but they were important to all who bought or sold commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in its subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid."

It is true that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. But when a contract belongs to that class it will be declared void, al-

though in that particular instance no injury to the public may result. 5 Lawson, Rights, Rem. & Pr., § 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictable nor prohibitory by a statute, termed a contract against public policy, (or sound policy,) is likewise void." Bish. Cont., § 473.

We do not find it necessary to go to the extent of holding, as do some of the authorities cited, that the rule which invalidates a stipulation for exemption from liability for one's own negligence is of universal application, in order to support the conclusion which we reach that the provision under consideration is void. To require us to reach that conclusion, it is only necessary for it to appear that the provision, if effectual, would cause defendant to disregard and neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, there can be no doubt.

There is nothing in Warren v. Railway Co., 41 Iowa, 484, in conflict with the conclusion we reach. That case involved the liability of the railway company for stock killed by it at a point where it had a right to fence. The company sought to escape liability on the ground that Bell, the owner of the pasture from which the stock escaped, had agreed with it to erect the fence and keep it in repair. But it was held that, as the owner of the stock was neither the owner of the pasture nor his tenant, the defense was not good. It was said by the court that, if Bell had agreed to erect and maintain the fence, he could not have recovered damages to his stock which resulted from the want of a fence; but the plaintiff in this case assumed no burden which the law imposed upon defendant. The case of Simmonds v. Railroad Co., 52 Conn., 271, is in some respects somewhat similar in principle to that

last cited. The case of Railroad Co. v. Spear, 44 Mich., 170, 6 N. W. Rep., 202, also cited by appellee involves a different question. It appeared in that case that the owners of a warehouse, of a railway track near it, and of a quantity of hay, employed a railway company to draw cars over the track for their accommodation. The engine employed to do the work was defective, and that fact was known to the owners aforesaid, who complained of it, but with that knowledge they continued to permit its use. It finally caused a fire, which destroyed the warehouse and hay. It was held that the owners of the property destroyed could not recover, for the reason that they had engaged the engine with knowledge of the defects which caused the loss. But in that case the plaintiffs not only owned the warehouse, but the track also, and the engine passed over that track, with their knowledge, and at their request, for their benefit. They knew in advance just what the danger to their property would be, and contributed to the result. But, putting upon the case a construction most favorable to appellee, and it is authority only for the doctrine that a railway company may exempt itself from liability to an individual on account of an existing and known defect in its machinery. Whether that may be done is a question which does not arise in this case. The agreement under consideration does not seek to hold defendant harmless on account of known and specified defects in engines, or a manner of operating them, recognized to be negligent, but from "all liability for damages by fire" caused by cars or engines lawfully on the track, whatever the cause, whether then existing and known, or not then existing and not foreseen. It is our opinion, for reasons stated, that the provision of the lease in question is contrary to public policy, and void. The judgment of the district court is reversed.

OPINION IN

GRISWOLD ET AL. VS. ILLINOIS CENTRAL RAILROAD COMPANY,

57 N. W. REP., 843.

(Supreme Court of Iowa, February 3, 1894).

RAILROAD COMPANY—NEGLIGENCE—FIRES SET BY ENGINE—CONTRACT EXEMPTING COMPANY FROM LIABILITY—VALIDITY.

1. Code, § 1289, making a railway company liable for damages from fire, does not give the public such an interest in the company's exercise of care with respect to buildings which it has permitted a person to erect on its right of way grounds as to render void, as against public policy, a contract exempting the company from liability for damages by fire negligently communicated to the buildings by the company's engines.

2. A contract whereby a railway company gives a person the right to erect an elevator and coal sheds on its right of way in consideration of his maintaining them, making shipments, over the company's road, and exempting it from liability for damage by fire negligently communicated to the buildings by the company's engines, is not made by the company in its capacity as common carrier, and is not governed by Code, § 1308, providing that a common carrier cannot exempt itself from liability as such carrier by contract.

3. Though the parties to the contract contemplated a place for dealing with the public, in the management of which the public might be interested, neither that interest, nor the agreement of the person permitted to erect the ele-

vator and coal sheds on the railway's right of way grounds that he would transact business so that neither the public nor the railway company should be prejudiced thereby, gives the public any interest as to who shall bear the hazard of the loss of the building from fire, so as to make void, as against public policy, the provision exempting the railway company from liability in case the buildings are damaged by fire negligently communicated thereto by the company's engines.

Robinson and Kinne, JJ., dissenting.

53 N. W., 295, reversed.

Appeal from district court, Buchanan county; J. L. Husted, Judge.

Action to recover damages for the loss of an elevator by fire, alleged to have been caused by negligence on the part of defendant. A demurrer to the answer was overruled. The plaintiffs electing to stand on their demurrer, judgment was rendered against them for costs, and they appeal.

R. W. Barger and E. E. Hasner, for appellants; W. J. Knight, for appellee.

GIVEN, J. A rehearing was granted in this case, and it is again submitted with further arguments. The facts disclosed by the pleadings, which are material to be considered, are sufficiently stated in the former opinion (53 N. W., 295,) and are as follows: "On the 30th day of April, 1890, the plaintiff Griswold owned a two and one-half story elevator building, warehouse, and corncrib attached, together with engine and boiler connections and feed mill therein, all of which were situated on the depot grounds of defendant immediately north of its track, in the village of Winthrop. In the morning of the day named, the property described

was totally destroyed by fire, which was kindled by sparks and cinders from a locomotive engine of defendant while passing on its track. The sparks and cinders escaped from the engine in consequence of defects in its construction and appliances, and in consequence of the negligent manner in which it was operated. The property destroyed was of the value of $6,000, and was, at the time, insured by the plaintiffs the Iowa State Insurance Company, the Commercial Union Assurance Company, Limited, the St. Paul German Insurance Company, and the Farmers' Fire Insurance Company in the sum of $1,000 each, or for the aggregate amount of $4,000. After the property was destroyed, each insurance company paid the amount of loss for which it was responsible, and, claiming that by reason of such payments they became subrogated to the rights of Griswold to the extent of the amounts so paid, they join him in demanding judgment against defendant for the value of the property destroyed. Griswold occupied the premises on which the property stood by virtue of a lease to him from defendant, which contained the following provisions: 'And the lessee, in consideration of the premises, hereby covenants and agrees with the lessor, its successors and assigns, to pay the said lessor, as rent for said premises, the sum of one dollar, to be paid at the time and in the manner following, to-wit, on the delivery of this lease; and the lessee further covenants and agrees with the lessor that he will, from the date of this indenture, put to use and maintain a good substantial elevator, coal sheds, and lumber yard on the above-described premises; and further agrees to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be

communicated to any property or structure on said described premises. And the said lessee hereby agrees to ship all grain, coal, and lumber he can control by the Illinois Central Railroad. And the said lessee further covenants and agrees with the said lessor that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid.' The defendant claims that plaintiffs are not entitled to recover, for the reason that Griswold undertook, by the terms of the lease, to protect and save it harmless from such losses as that in question. The ground of the demurrer is as follows: 'The petition and answer show that the action is commenced by the owner and insurer of an elevator built upon defendant's land alongside of its track, for the purpose of handling grain, and that said elevator was burned through the negligence of defendant, its agents and employes. The plaintiffs therefore say it is against public policy, and contrary to the statutes of Iowa, for the defendant to attempt to restrict by contract its liability for the negligence of its agents, employes and servants; and that said defense, so far as it is based upon exemptions from liability by reason of this contract of lease, is not good, as such contract of exemption is void.' No special claims are made in behalf of the insurance companies; therefore, their interests, and that of Griswold, for the purpose of this appeal, will be treated as governed by the same rules."

1. It will be seen, from the statement of the case, that the controlling question is whether that clause in the lease

whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently communicated to the property on the leased premises in the operation of the railroad is void, as against public policy. The right to so contract as to fire accidentally communicated is not questioned, but only the right to so contract as to fire negligently communicated. Public policy is variable,—the very reverse of that which is the policy of the public at one time may become public policy at another; hence, no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void, as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society. Public policy has been aptly described as "an unruly horse, and, when once you get astride, you never know where it will carry you." It was said by Wilmot, C. J.: "It is the duty of all courts to keep their eyes steadily upon the interests of the public, even in the determination of community justice, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance in foro civili." Other courts have said: "We may take it as well settled that in the law of contracts the first purpose of the courts is to look to the welfare of the public, and, if the enforcement of the agreement would be inimical to its interest, no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement. The common law will not permit individuals to oblige themselves by a contract either to do or not to do, anything, when the thing to be done or omitted is in any degree clearly injurious to the public." Again, it is said: "It must not be forgotten

that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract." Egerton v. Earl Brownlow, 4 H. L. Cas., 1; 3 Amer. & Eng. Enc. Law, p. 875, note 3; Boardman v. Thompson, 25 Iowa, 501. Aided by these definitions and cautions, we proceed again to inquire whether the clause of the agreement in question, if carried into effect, would be injurious to any interest of the public, or, in other words, whether the public has any interest in this provision of the contract. The conclusion of the former opinion is "that the provision, if effectual, would cause the defendant to disregard and neglect a duty which it owes to the public, and thereby violate an obligation imposed upon it by law." This conclusion rests, in part at least, upon holding that sections 1289 and 1308 of the Code are applicable to the question under consideration, and that the defendant owed it as a duty to the public to operate its road with care with respect to plaintiff's property. The discussion on rehearing leads us to inquire whether, under the law and facts, it is correct to say that the defendant owed any duty to the public with respect to the plaintiff's property. The former opinion holds correctly that the liability of railroad corporations, under section 1289, for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; but the

question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff. The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision of section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not upon his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents, and employes, and that these might be negligent in the performance of their duties. The plaintiff had an insurable interest, and could, as he did, protect himself, in part at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only pro-

tect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. Plaintiff Griswold contracted with his coplaintiffs, the insurance companies, for indemnity against loss by fire, whether caused by accident or negligence. The fire occurred through neglect, and the insurance companies, as they were bound to do, paid the insurance. Those contracts, like this, were for indemnity against liability by fire, whether caused by accident or negligence. Many losses by fire occur through the negligence of the insured or his family, and recovery is had unless the negligence was willful. While these policies are not before us, we may assume, we think, that under them the plaintiff Griswold would have been entitled to recover, even though the loss had occurred through his own negligence, unless it was willful. The public had no interest in these contracts of insurance between the plaintiffs; nor were they against public policy, because the companies agreed to indemnify the assured against loss caused by his own negligence. This is not a question whether, under section 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the

defendant acquired this right of way in the exercise of the right of eminent domain did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location.

2. It is contended that the defendant entered into this contract in its capacity as a common carrier, and therefore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses, or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable. Johnson's Adm'x v. Railroad Co., (Va.), 11 S. E., 829, and other cases involving contracts of exemption from liability for causing injuries to, or death of, persons, are not applicable. The public has an interest in the life and safety of every human being, and every such contract is clearly injurious to public interest, but not always so as to property.

3. In the lease the plaintiff Griswold agrees "that he will transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the

public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." While it is evident the parties contemplated a place for dealing with the public, in the maintenance and management of which the public might be interested, neither that interest nor Mr. Griswold's agreement gave the public any interest as to who should bear the hazard of the loss of the buildings by fire. The plaintiff indemnified himself against the loss, in part at least, by insurance, and the insurance companies have paid him, as they were bound to do. Surely, public policy does not demand that the defendant shall now reimburse these insurance companies for the payments they were bound to make by their own contract, and which the defendant has never promised to repay. As to the claim of the plaintiff Griswold to recover the excess of the loss over the amount of insurance, public policy answers, "You must stand by your contract." After a careful review of the case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the district court should be affirmed.

ROBINSON, J., (dissenting): I cannot assent to the conclusion of the foregoing opinion that the agreement in question was effectual to relieve the defendant of liability for negligently setting fire to and destroying the property of the plaintiff. Something has been said on rehearing in regard to the liability of the defendant to the insurance companies and their right to recover; but as no question in regard to such liability and right of recovery, as distinguished from the liability of defendant to Griswold for the

loss he sustained, for which he has not been compensated, is presented by the pleadings, or was argued on the first submission of the cause, it should not, as it seems to me, be given weight now. It is well settled that, in a civil case, a party cannot, on rehearing, make a case different from that presented on the original submission. McDermott v. Railway Co., (Iowa), 52 N. W. 185, and cases therein cited. It follows that the only questions which we should now consider are those involved in determining the character and effect of the provision of the lease in question, and the right of Griswold to recover, without regard to the interests of the insurance companies. On the rehearing we have been favored with elaborate arguments by representatives of several of the leading railway corporations doing business in the state, and in explanation it is said that the questions involved are of interest to all railway companies in the state, and that the former opinion,if adhered to, will seriously affect their management and business. It is probably fair to presume that leases with provisions similar to the one in controversy are now, or soon will be, in general use in the state, and that the questions involved are of interest to the large number of persons who are now, or shall hereafter be, concerned in buildings and property located on land owned by railway corporations by virtue of leases from the corporations. The importance of the questions to the railways and to people doing business with them is apparent. It does not seem to me that the authorities cited in the opinion of the majority justify the conclusions they reach. Section 1289 of the Code provides that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway. * * *" It was said in West v. Railway Co., 77

Iowa, 654, 35 N. W. 479, and 42 N. W. 512, that this statute imposes an absolute liability upon railway corporations without regard to the contributory negligence of the person injured, for damages resulting from fires set out or caused by negligently operating their railways. The facts admitted in this case show that the fire in question was caused by defendant in operating its railway, and that the fire was the result of negligence on its part. Whether a railway company may limit its liability for a fire which it causes without fault on its part is a question not involved in this case; but we are required to determine whether a railway company may, by a contract entered into before the act, limit its liability for a fire which is caused by negligence on its part in operating its railway. Section 1308 of the Code provides, in effect, that a common carrier or carrier of passengers cannot exempt itself from liability, as such carrier, by contract. Although there is some conflict in the authorities, yet it is the general rule, in the absence of statutory regulations, that railway companies cannot restrict their liability for negligence in transporting passengers or freight by contracts made in advance of the carriage; and the same is true in regard to the power of telegraph companies to limit their liability for negligence in transmitting dispatches. It is said in Cooley on Torts, (page 687), with reference to agreements of that kind, that "the cases of carriers and telegraph companies have been specially mentioned, because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

In Johnson's Adm'x v. Railroad Co., (Va.), 11 S. E., 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarry men, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to, or death of, any of the members of the said firm, or of any of its agents or employes, sustained from said work, should such death or injury occur from any cause whatsoever." The court, in commenting on this provision of the agreement, said: "To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against the public policy are void. Nothing is better settled—certainly in this court—than that a common carrier cannot, by contract, exempt himself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire. This is so, independently of section 1296 of the Code, and the principle which invalidates a stipulation for exemption from liability for one's own negligence is not confined to the contracts of carriers as such. It applies universally."

Railway corporations are quasi public agencies, and per-

form a public duty. They are agencies created by the state with certain privileges, and subject to certain obligations. A contract that they will not discharge their obligations is a breach of a public duty, and cannot be enforced. Railroad Co. v. Ryan, 11 Kans., 609. An agreement by which a railway corporation undertakes, without the consent of the state, to relieve itself of a burden which is imposed upon it by law, is void, as against public policy. Thomas v. Railroad Co., 101 U. S., 71. Among the obligations imposed upon a railway corporation is that of using reasonable diligence in furnishing its road with safe equipments, including locomotive engines, and o f operating its road without negligence. That is a duty which it owes to the public, and any agreement which tends to lessen the diligence and care with which it furnishes and operates its road is, to that extent, against public policy. The contract entered into between Griswold and defendant was not for carriage, and primarily it was for the benefit of the parties to it, and not in the interest of the public. But it is clear that its purpose on the part of defendant was to benefit and promote its business as a carrier. The nominal sum of one dollar was not the consideration which induced it to enter into the agreement. Elevators, coal sheds, and lumber yards are important aids to a railway engaged in carrying grain, coal, and lumber, in securing and transacting that branch of its business; and the promise of Griswold to maintain and use them, and to ship all grain, coal, and lumber he could control over defendant's road, and the prospect for business which the existence and use of the improvements named held out to defendant, were no doubt important and controlling considerations which induced it to execute the lease. Those improvements were not only of value to the defendant, but

they were important to all who bought or sold or stored commodities which were received in them. In other words, the lease was a means to promote the end for which the road of defendant was built and operated, and the public was interested in the improvements for which it provided, to the extent to which it patronized them. Its interest may not have been a distinct entity, capable of enforcement at the suit of any citizen, but it was one which the law recognizes, and which it will, in a suitable case, protect. The lease itself fully recognizes an interest of the public in the subject-matter. It provides that the lessee "shall transact the business for which said buildings are erected and designed, at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal, and lumber building so erected as aforesaid." It is true that a contract is not void, as against the public policy, unless it is injurious to the interests of the public, or tends to have that effect, or contravenes some established interest of society. But, when a contract belongs to one of those classes, it will be declared void, although in a particular instance no injury to the public may result. 5 Lawson, Rights, Rem. & Pr., § 2392. "A contract invading any one of the other interests which the law cherishes, though to do what is neither indictible nor prohibited by a statute, termed a contract 'against public policy' (or sound policy), is likewise void." Bish. Cont., § 473. To justify the conclusion that the provision under consideration is void, it is only necessary to find that the provision, if effectual, would cause, or tend to cause, the defendant to disregard or neglect a duty which it owes to the pub-

lic, and thereby violate an obligation imposed upon it by law. That such would be the effect of the provision, if sustained, does not appear to me to be doubtful. It was not intended merely to require Griswold to bear the loss which should result from the hazards to which his property should be exposed by operating the railway with reasonable prudence and care, but it was intended to exempt the defendant from all liability for damages from fire which should be caused in operating its railway without regard to acts of negligence, or lack of precaution and care on its part, which should contribute to the loss. The agreement sought to exempt the defendant from liability for negligence, whatever its nature, which should be involved in the management of its railway. Such negligence might be manifested in many ways—as, in the use of insufficient or defective machinery, in the employment of careless or incompetent train men, or in having an insufficient number of train men—and was necessarily of a kind to affect the business of defendant as a common carrier. The tendency of the agreement was to make the defendant, in keeping its locomotive engines in good order, in adopting improvements to prevent the escape of fire, and in selecting its employes, less diligent than it would otherwise have been, and thus to expose, not only the property of Griswold, but all other property of a combustible kind located upon its grounds, to dangers which reasonable care on its part would have prevented. The tendency of the agreement is more clearly seen when the probable aggregate effect of such agreements, entered into between defendant and all the tenants on its right of way and depot grounds in the state, is considered. To keep in good order the machinery and appurtenances of a railway, and to operate it in the manner which reasonable prudence demands,

involve the expenditure of large sums of money and the constant exercise of skill and care by railroad employes. Whatever tends to lessen the degree of care used in operating a railway is to that extent inimical to public interest, and contrary to public policy. Combustible property on the depot and right of way grounds of a railway company is of necessity more exposed to danger from fire caused by operating the railway than property outside of their limits; and if it can, by agreement, protect itself against liability for negligently destroying the property on its grounds, the common experience of mankind, as applied to other matters, teaches us that the natural effect of such an agreement is to lessen the care and diligence the railway company will use to prevent such negligence and the consequent loss. It follows that each tenant is interested in the agreement of every other tenant on the same line or division of railway, and that the people who store property in the buildings of such tenants, or who are concerned in grain, coal, lumber, and other articles which are received in, or delivered from, such buildings, are also interested in the agreements.

It does not seem to me that the law which governs ordinary contracts of insurance is applicable to this case. In such contracts the property owner is never, in terms, insured against the consequences of his own negligence. On the contrary, great care is taken to guard against and prevent negligence on his part. Insurance to the full value of the property is not given, and all inducement to negligence on his part is withheld. If loss result from his negligence, as a rule, he and the insurance company, only, are affected, his negligence not being of a character to affect the public. I am not aware that an agreement to insure a person against the consequences of his own negligence, the natural and

probable effect of which would be to encourage such negligence to the danger and prejudice of others, is sustained by the courts. It is true that the public has no interest in the damages in controversy in this action, but it had an interest in the agreement in question so far as it tended to induce negligence on the part of defendant in operating its railway; and as negligence of that kind was the natural and probable effect of the agreement, and as the agreement is not separable, it would seem to follow that it should be held void. This conclusion is not only in entire harmony with the authorities cited in the opinion of the majority, but, as it seems to me, is required by them, as well as by the authorities cited in this dissent.

Whether the defendant owed to the public any duty in regard to its own buildings, whether the defendant had any insurable interest in the property of Griswold which was destroyed, and whether the insurance companies are entitled to recover the amounts they have paid to Griswold are questions which do not appear to me to be so presented as to make it proper for us to determine them on this appeal, and in regard to them I express no opinion.

Kinne, J., concurs in the dissenting opinion.

STATUTES OF IOWA.

(The sections given are from McClain's Annotated Code of Iowa, 1888.)

LIABILITY OF RAILWAY COMPANIES FOR FIRES.

Section 1972. * * * Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except to double damages.

CRIMINAL LIABILITIES FOR FIRES.

"Sec. 5188. *Setting out fire*, 3889; 17 G. A., Ch. 55. If any person wilfully, or without using proper caution, set fire to and burn, or cause to be burned, any prairie or timbered land, or any inclosed or cultivated field, or any highway by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both fine and imprisonment, in the discretion of the court." (R., Sec. 4231; C., '51, Sec. 2607.)

"Sec. 5189. *Allowing fire to escape.* 3890. If any person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape from his control, between the first day of September, in any year, and the first day of May following, he shall be deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars." (9 G. A., Ch. 53.)

Members are exempt from poll tax, military duty, jury service and labor on highways.

"Sec. 723. *Board of health; fire companies.* 525. The city council shall have power to establish a board of health, with all the powers and duties specified in sections four hundred and fifteen, four hundred and sixteen, four hundred and seventeen and four hundred and eighteen of the ninth chapter of this title (Secs. 556, 559); to establish a city watch or police; to organize the same under the general supervision of the mayor or marshal; to prescribe their duties and powers, and to establish and organize fire companies and provide them with proper engines and such other instruments as may be necessary." (R., Sec. 1695; 11 G. A., Ch. 107, Sec. 1.)

"Sec. 920. *Fire department.* 21 G. A., Ch. 171, Sec. 1. All cities acting under special charter are hereby authorized, in addition to the taxes now authorized by law, to levy and cause to be collected a special tax on the taxable property of such cities sufficient to pay the expense of organizing, keeping and maintaining a paid fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor, provided, however, that said tax shall not exceed the sum of two mills on the dollar in any one year."

"Sec. 2432. *Exemptions to.* 1560. Any person who is an active member of any fire-engine, hook and ladder, hose or any other company for the extinguishment of fire, or the protection of property at fires under the control of the corporate authorities of any city or incorporated town, shall, during the time he shall continue an active member of such company, be exempted from the performance of any military

duty, and from the performance of labor on the highways on account of poll tax, and from serving as a juror; and any person who shall have been an active member of such company in any city or town as aforesaid, and shall have faithfully discharged his duties as such for the term of ten years, shall be forever thereafter exempted from the performance of military duty in the time of peace, from serving as a juror, and from the performance of labor on the highways." (R., Sec. 1763; 13 G. A., Ch. 18, Sec. 1.)

"Sec. 2433. *Certificate.* 1561. Any person who has served in any company for the term of ten years, as provided in the preceding section, shall be entitled to receive from the foreman of the company of which he shall have been a member, a certificate to that effect, and on the presentation of such certificate to the clerk or recorder of the proper city or town, such clerk or recorder shall file the same in his office, and give his certificate, under the corporate seal, to the person entitled thereto, setting forth the name of the company of which such person shall have been a member, and the duration of such membership; and such certificate shall be received in all courts and places as evidence that the person legally holding the same is entitled to the exemption hereinbefore mentioned." (R., Sec. 1764.)

"Sec. 2436. *Destruction of fire apparatus.* 1564. Any person or persons who shall wilfully destroy or injure any engines, hose carriage, hose, hook and ladder carriage, or anything whatever used for the extinguishment of fires, belonging to any fire company, on conviction thereof shall be sentenced to imprisonment in the penitentiary for a period of not less than one year, nor more than three years. (R., Sec. 1766.)"

"Sec. 2437. *Removal of fire apparatus.* 1565. It shall not be lawful for any person to remove any engine or

other apparatus for the extinguishment of fire, from the house or other place where the same shall be kept or deposited, except in time of fire or alarm of fire, unless properly authorized so to do by the president and director, or foreman, of the company to whom the same shall belong, or their duly authorized agent; and any person offending against the provisions of this section shall forfeit and pay a sum not less than five dollars, nor more than twenty dollars, to be sued for and recovered in the name of the state, for the use of the school fund, before any mayor, recorder, or magistrate of the city or town wherein the offense has been committed. (R., Sec. 1767.)"

"Sec. 5286. *To dams, locks, mills, machinery, etc.* 3978. If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory, or maliciously draw off the water from any mill pond, reservoir, canal, or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishing of fires, he shall be punished by imprisonment in the county jail not exceeding one year, and by fine not exceeding five hundred dollars. (R., Sec. 4319; C., '51, Sec. 2679.)"

CITIES MAY ESTABLISH FIRE LIMITS.

"Sec. 616. *Danger from fire.* 457. They shall have power to make regulations against danger from accidents by fire, to establish fire districts, and, on petition of the owners of two-thirds of the grounds included in any square or block, to prohibit the erection thereon of any building, or any addition to any building, unless the outer walls thereof be made of brick and mortar, or of iron and stone and mortar, and to provide for the removal of any building or additions erected

contrary to such prohibition. (R., Sec. 1058; 12 G. A., Ch. 106.)"

"Sec. 818. *Fire regulations.* 12 G. A., Ch. 21, Sec. 1. Cities of the first-class shall have power to make regulations against danger or accidents by fire, to establish fire limits, and to prohibit the erection thereon of any building, or addition to any building, unless the outer walls and roof thereof be made of brick and mortar, or of iron and stone and mortar, or of other non-combustible material, and to provide for the removal of any building or addition erected contrary to such prohibitions."

NON-COMBUSTIBLE BUILDINGS AND FIRE-ESCAPES.

"Sec. 895. *Fire protection.* 22 G. A., ch. 1, Sec. 15. Said board shall have the power to require fire-proof roofs to be used on all buildings erected in squares or blocks of such cities, when the outer walls thereof are constructed of non-combustible materials, and to require non-combustible material to be used in the outer walls of all buildings built or erected in such squares or blocks within the fire limits of such cities."

"Sec. 897. *Fire-escape.* 22 G. A., ch. 1, Sec. 17. It shall be the duty of such board to regulate the size, number and manner of construction of fire-escapes, doors and stair-ways of theaters, tenement houses, audience rooms and all public buildings, whether now built or hereafter to be built, used for the gathering of a large number of people, so that there may be convenient, safe and speedy exit in case of fire."

REGULATION OF CHIMNEYS, STOVE-PIPES, ETC.

"Sec. 734. *Chimneys and heating apparatus.* 19 G. A., ch. 89, Sec. 4. To regulate and control the construction of chimneys, stacks, flues, fire-places, hearths, stove-pipes, ovens, boilers and heating apparatus used in or about buildings, and

to require and regulate the construction of fire-escapes, and to cause any or all of them to be removed, or placed in safe condition, when considered dangerous, and to assess the cost thereof on the property and against the owners thereof."

REGULATIONS TO PREVENT FIRES.

"Sec. 735. *Manufactories; unsafe buildings.* 19 G. A., ch. 89, Sec. 5. To regulate manufactories which are dangerous in causing or promoting fires; to prevent the deposit of ashes and combustible matter in unsafe places, and to cause all such buildings and inclosures as may be in a dangerous or unsafe state to be put in a safe condition."

"Sec. 736. *Lights, bonfires, fireworks.* 19 G. A., ch. 89, Sec. 6. To regulate the use of lights in stables, shops and other places and the building of bonfires, and to regulate or prohibit the use of fireworks, fire-crackers, torpedoes, roman-candles, sky-rockets and other pyrotechnic displays."

"Sec. 737. *Inspection of steam-boilers and magazines.* 19 G. A., ch. 89, Sec. 7. To provide for the inspection of steam-boilers, and all places used for the storage of explosive or inflammable substances or materials, and to prescribe the necessary means and regulations to secure the public against accidents and injuries therefrom, and to assess the costs and expense of such proceedings against the property and owners thereof."

R. W. BARGER,
CHARLES A. CLARK,
Counsel for Plaintiffs in Error.

No. 876. 775 xc.

Brief of Keeler for Pl. in Err.

Filed Mar. 9, 1896.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

876

HARTFORD FIRE INSURANCE COMPANY ET AL.
PLAINTIFFS IN ERROR,

vs.

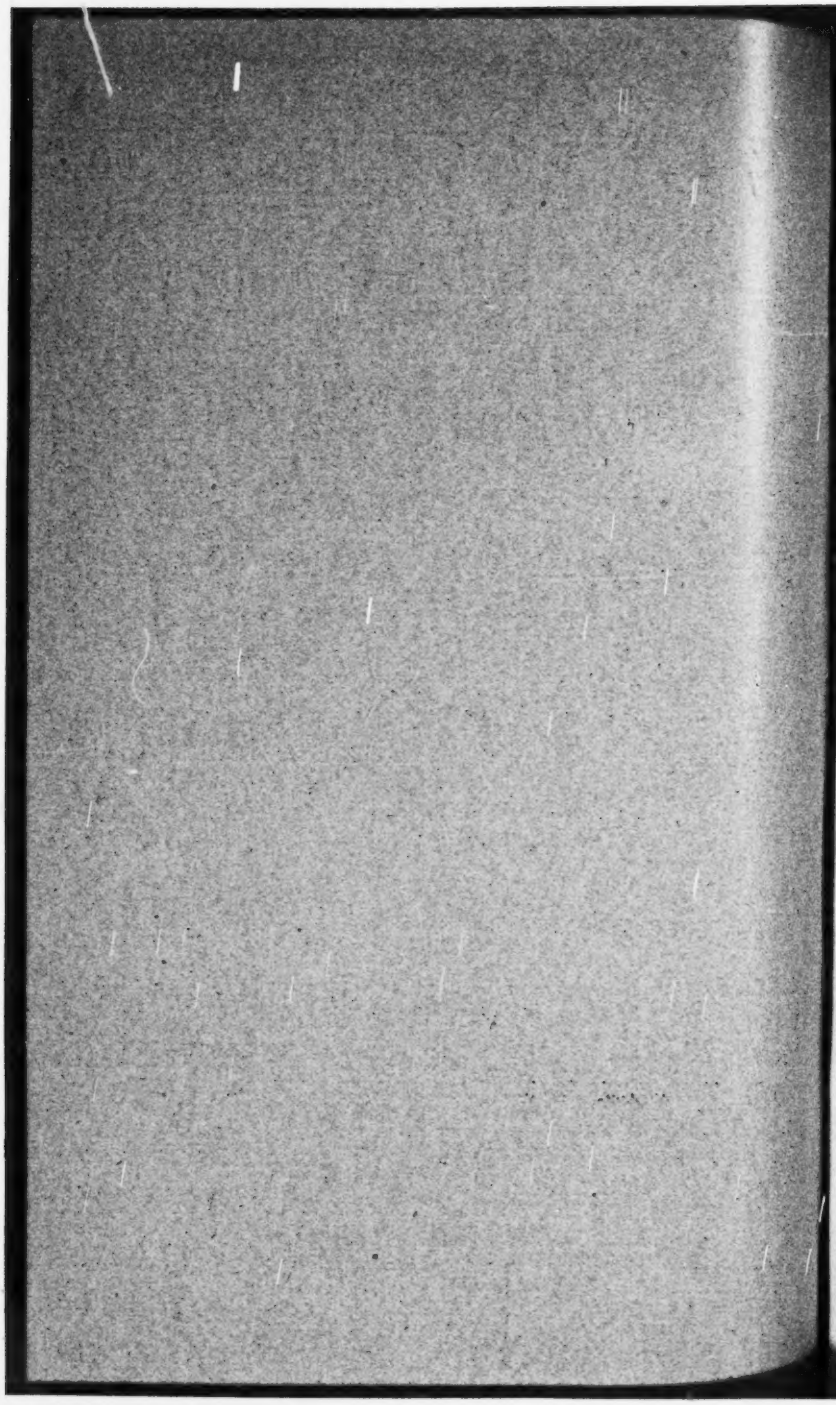
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY
COMPANY, DEFENDANT IN ERROR.

ON PETITION OF PLAINTIFFS IN ERROR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

CHARLES B. KEELER,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 69 DEARBORN ST., CHICAGO.



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BRIEF FOR RESPONDENT.

I.

Statement of the Case.

The record discloses that by written instrument dated February 1, 1890, Simpson, McIntire & Co. leased from the Chicago, Milwaukee and St. Paul Railway Company, for the term of one year, a portion of its station grounds at Monticello, Iowa, for the purpose of erecting and maintaining thereon a cold storage warehouse, in close proximity to the railroad tracks. The rent was merely nominal, being only $5 a year. This lease was made and accepted,

"Upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of, any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company."

Under the terms of this lease, Simpson, McIntire & Co. entered upon the demised premises and erected thereon the cold storage warehouse in question. After expiration of the year they continued in possession, under the terms and conditions of the original lease, and were so occupying at the time of the fire. On November 11, 1892, said warehouse and contents were totally destroyed by fire, the loss aggregating about $27,118.88; being $7,000 on building and $20,118.88 on butter and eggs. Insurance companies holding policies thereon, paid $23,450 in settlement, and being thereby subrogated, *pro tanto*, to any rights of the insured, in May, 1893, brought suit against the railway company to recover the amounts so paid, alleging that the fire was set by negligent operation of its trains. Simpson, McIntire & Co., owners of the balance of the claim, refusing to join as plaintiffs, were made nominal defendants; but they filed a written disclaimer of interest in the litigation, and asked to be dismissed and relieved from liability for costs.

This suit was begun in the District Court of Jones County, Iowa, and removed by defendant to the Circuit Court of the United States for the Northern district of

Iowa. In defense of the action said railway company pleaded the exemption contained in the foregoing clause of its lease. Plaintiffs demurred upon the ground that such exemption from liability for negligence was contrary to public policy and void. At the argument it appeared that the Supreme Court of Iowa, in the case of *Griswold.* v. *Ill. Cent. R. R. Co.*, 53 N. W. Reptr., 295 had first thought that a similar exemption in a railroad lease was opposed to public policy, but, upon rehearing, had afterwards reached an opposite conclusion, and had finally held that such exemption or release was not in violation of the statutes of Iowa or contrary to any *public policy* of that state, but was lawful and would be enforced by the Iowa courts. It also reaffirmed such decision, by denying a second rehearing.

Griswold v. *Ill. Cent. R. R. Co.*, 90 Iowa, 265.

The Circuit Court, Shiras, J., without intimating his opinion upon the question, considered as a new one, thereupon held that he ought to follow the decision of the state court and sustain the validity of the lease in question. This upon the ground that in so far as that court had based its holding upon the fire statute of Iowa, it was binding upon Federal courts, and in so far as such decision rested upon a determination of the public policy of the State of Iowa it was equally authoritative, because the question was essentially a *local* one, to be settled by the legislature or courts of the state itself. This opinion is reported in

Hartford Fire Ins. Co. v. *C., M. & St. P. Ry. Co.*, 62 Fed. Reptr., 904.

The court thereupon overruled the demurrer, and plaintiffs electing to stand thereon, judgment was rendered

against them for costs. They sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, and on October 7, 1895, that court, Sanborn, J., filed an opinion affirming the judgment below, upon the broad ground that the exemption in question was not contrary to public policy, but was valid and enforceable, as a question of general law.

Hartford Fire Ins. Co. v. *C., M. & St. P. Ry. Co.*, 70 Fed. Reptr., 201.

Plaintiffs in error now apply for a writ of certiorari to review this decision of the Circuit Court of Appeals.

II.

Brief and Points.

It is well settled that the granting of a writ of *certiorari* to review a decision of the Circuit Court of Appeals, rests entirely within the discretion of this court, and is allowed only when questions of gravity and importance are involved.

In re Woods, 143 U. S., 205.
Lau Ow. Bew. v. *U. S.*, 144 U. S., 58.

Accordingly, this court has held that the power to grant such writ, was "a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity, and general importance, or in order to secure uniformity of decision." And it was said that "while there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals, under this provision, only two have been granted."

Am. Con. Co. v. *Jacksonville Ry.*, 148 U. S., 383.

C. & N. W. Ry. Co. v. *Osborne*, 146 U. S., 354.

Upon this application, therefore, the sole inquiry is, "whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for, in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

Lau Ow Bew's case, 141 U. S., p. 587.

In the light of these decisions, we contend that the questions involved in the case at bar, are not of sufficient gravity or doubt to justify a review by this court. At the outset, we call attention to the fact that these questions are misconceived and misstated in the petition and brief of counsel for plaintiffs. They put them thus:

"*First.* A railway company neglects to furnish station facilities in the form of cold storage warehouses and grain elevators, and thus compels its patrons, the public, to furnish these requisite conveniences and facilities for themselves; the railway company granting, however, to the patrons who furnish such facilities, a license in the form of a lease at purely nominal rent, to erect and maintain such elevators and warehouses on its station grounds, and adjacent to its side-tracks. Under such circumstances, can the railway company annex to its said license or lease, a condition that it shall not be liable for its own negligence in burning such warehouses and freight stored therein for shipment? Is such an attempted limitation of the liability of a railway company for the destruction of the freight and other property of its patrons, contrary to public policy and void? The Court of Appeals of the Eighth Circuit held such limitation a valid one. It is this decision which is now sought to be reviewed." (Petition for writ, pp. 1, 2,)

We insist that no such questions are involved in this case, and that no such holding was made by the Court of Appeals. There can be no doubt upon this point. The facts are contained in plaintiffs' petition, and defendant's amended answer. There is absolutely nothing in the record to warrant a claim that this railway company neglected to furnish proper station facilities or compelled its patrons to provide such accommodations for themselves. So far as appears, the company had ample facilities at Monticello for the proper receipt and storage of all products delivered to it for transportation, or awaiting delivery after carriage. This lease was not made to Simpson, McIntire & Co. as shippers, or in respect of any duty or obligation of the lessor as a common carrier. They simply rented vacant land upon which to erect a private warehouse for the safe and convenient storage of butter and eggs, for themselves and others. If the owners afterwards desired to ship such products over defendant's railway, and tendered or delivered them to the company for transportation, *then* would first arise the relation and consequent duties of shipper and carrier. But no such state of facts existed in this case.

That we are correct in this position, is shown not only by the record itself, but also from the language of the Court of Appeals. They say:

"The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company, none of it was awaiting delivery by the company to its consignees after transportation, and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the

store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its position of a common carrier, or by its character of a quasi public corporation."

"It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that if it employed Simpson, McIntire & Co., to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. *Stock Yards Co.* v. *Keith*, 139 U. S., 128, 133, 136; 11 Sup. Ct., 461. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Co., to receive or store any of the goods of its shippers."

Hartford Fire Ins. Co. v. *C., M. & St. P. Ry. Co.*, 70 Fed. Reptr., pp. 204 & 6.

The real issue presented by this record and decided by the Court of Appeals, was stated by Mr. Justice SANBORN in the following language:

"*Is a condition, in a lease by a railway company, of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon, caused by fire set by its locomotives, or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case.*" (p. 202.)

It will be seen at once that this question is vitally different from the one stated by counsel for petitioners, and involves other principles. We shall advert to them hereafter.

III.

Again, the application for this writ is based, in part, upon the erroneous assumption that the judgment below was affirmed by a *divided* court, and that there was a serious difference of opinion among the judges of the Circuit Court of Appeals as to the correctness of the ground upon which it was rendered. This error is made the foundation of counsel's claim that "The questions of law involved in this action are in a state of grave and serious uncertainty."

(Petition for Writ, Par. 14 & 18, pp. 7, 8.)

They say: "In the Court of Appeals Judge Caldwell refused to join in the affirmance of the judgment below, except upon the express ground that the Federal courts were bound by the decision in the Griswold case. As to the validity of the exemption in the lease, as an original proposition, he said, in the last clause of his dissenting opinion, '*the question as presented by this record is not free from doubt.* It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case.' Judges Sanborn and Thayer held that they were not bound by the decision in the Griswold case, but sustained the exemption from liability for negligence, contained in the lease, as the same was specifically set up by the defendant in error." (Brief, p. 8.)

We think that counsel for petitioners misapprehend the language and pervert the meaning of Judge Caldwell's separate opinion. He nowhere expresses, or even intimates disagreement with Judges Sanborn and Thayer in holding that the exemption from liability, in this lease, was not contrary to public policy, *considered as a question of general law.* He utters no word of dissent with the

reasoning or conclusion, upon that proposition. Upon the contrary, says:

"I concur in the conclusion reached in this case, *but dissent from this statement* in the majority opinion, namely: 'Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy, is a question of general law, and not dependent solely upon any local statute or usage.'"

To make his meaning more clear, Judge CALDWELL adds:

"*There is no difference of opinion between the Supreme Court of Iowa and this court, as to the validity of the lease and all its conditions, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the decision of the Supreme Court of Iowa, if the two courts differed in opinion on the question of public policy.*" (70 Fed. Reptr., p. 208.)

Does not this language plainly mean that all the justices of the Circuit Court of Appeals agree in holding the conditions of this lease to be valid and enforceable, but that one dissents merely from the *dictum* of his associates upon another point, not necessary to the decision. His concluding remarks: "The question as presented by this record, is not free from doubt, etc.," clearly refer to the point he was considering, and not to the conceded question of the validity of the exemption clause in this lease. We submit that the opinion discloses no disagreement between the learned judges of the Circuit Court of Appeals, upon the question on which the decision was based.

In this respect they were in entire accord with the Supreme Court of Iowa; and refer to the Griswold case as holding, "after repeated argument and the most careful deliberation," that such provision in a railroad lease,

"violated no law of that state, was not injurious to the public interests, and was not against public policy." They further say: "It constitutes an authoritative construction of the statutes of the state and a very persuasive authority that the contract here in question is not contrary to public policy." (70 Fed. Reptr., p. 203.)

It thus appears that the only courts which have ever passed upon this question, are in accord in their holding. Even counsel do not claim that these decisions are in conflict with this court. They say: "The precise questions now involved have not been decided or passed upon here. Indeed, they are practically new questions." (Brief, 10.) We maintain that no "conflict" of judicial opinion exists, and that the decisions are not "in a state of grave and serious uncertainty" upon this question. Therefore, no reason of that nature now requires or justifies a review of the case by this honorable court.

IV.

THE EXEMPTION CLAUSE OF THIS LEASE WAS NOT CONTRARY TO PUBLIC POLICY OR VOID.

The term "public policy" does not admit of exact definition or precise explanation. Perhaps the most concise and accurate general definition is that of the Supreme Court of Illinois:

> "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."
>
> *People* v. *Gas Trust*, 130 Ill., 294.

Of necessity, there can be no fixed and unalterable standard of public policy. It varies in different countries,

The same holding has recently been made in California.

and even in different states or localities of the same country. It differs, also, in the same community with different years, conditions and interests. It changes with the advance in civilization, the variation in climate, the physical or political conditions, and even with the growth of states. It has been aptly described as a "variable quantity."

"One thing I take to be clear, and it is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities and opportunities of the public."

Davis v. *Davis*, 36 Chy. Div., 359.

"The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

Evanturel v. *Evanturel*, L. R., 6 P. C., 29.

Maxim-Nordenfeldt, &c., Co., v. *Nordenfeldt*, 3 Chy., 665.

"Public policy is variable—the very reverse of that which is the policy of the public at one time may become public policy at another."

Griswold v. *Ill. Cent. R. R. Co.*, 90 Iowa, p. 268.

"The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."

Pope Mfg. Co. v. *Gormully*, 144 U. S., p. 233.

"The term 'public policy' or 'policy of the law,' suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned."

Rogers v. *Steamboat Co.* (Me.), 29 Atl. Rep., p. 1074.

"Public policy changes with the changing condition of the times. * * * When it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice BURROUGH in *Richardson* v. *Mellish*, 2 Bing., 252, that public policy 'is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law.'"

SANBORN, J.: In *U. S.* v. *Trans.-Mo. Ft. Assn.*, 7 Cir. Ct. App., p. 72.

"The term, as it is often popularly used and defined, makes it an unknown and variable quantity—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state, on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice and to which they give effect, must be deducted from these sources."

CALDWELL, J.: In *Swann* v. *Swann*, 21 Fed. Reptr., 301.

"The public policy of a state or nation must be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Vidal* v. *Girards's Exrs.*, 2 How., 127, 197."

SANBORN, J.: In *Hartford Fire Ins. Co.* v. *C. M. & St. P. Ry. Co.*, 70 Fed. Reptr., 202.

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is

one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract."

JESSEL, M. R. : In *Printing & Num. Reg. Co.* v. *Sampson*, The Law Repts., 19 Equity, 465.

Griswold v. *Ill. Cent. R. R. Co.*, 90 Iowa, 269.

And it has been forcibly said:

"The power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

Richmond v. *Ry. Co.*, 26 Iowa, 202.

Kellogg v. *Larkin*, 3 Pinney (Wis.), 123.

In the case at bar, it does not appear, and cannot be presumed, that the lease in question contemplated any relations between lessor and lessee by which the public duties and obligations of a common carrier were to arise or be performed. There is absolutely nothing in the record to warrant such claim. The mere fact that a railway company sustains a quasi public relation as carrier of freight and passengers, does not preclude it from leasing portions of its right of way for private use, upon such terms and conditions as may be mutually agreed upon. The provisions of this lease did not affect any public duties which the lessor, in its other capacity of common carrier, might be subject to. It must be conclusively presumed that this railway company possessed adequate and

ample station facilities at Monticello for the proper handling and storage of all products delivered or tendered to it for transportation, or awaiting delivery to consignees after carriage. So far as appears, it was both able and willing to perform, in a prompt and efficient manner, every duty owing to the public at large or to any individual member thereof. There can be no pretense that its service was inadequate or its accommodations insufficient. Simpson, McIntire & Co. made no complaint. The record does not indicate that they shipped, received, or offered to ship or receive, any butter and eggs over defendant's line of railway. It does show, however, that as dealers in those products, they rented vacant ground adjoining the tracks "*for the purpose of erecting and maintaing thereon a cold storage warehouse.*" (See lease.) It is probably true that the lessor expected, and the lessees contemplated, future shipments from this warehouse when winter season and higher markets should make it profitable to sell, and, doubtless, the expected benefits arising from carriage of such products at some future time, was one of the inducing motives to the railway company to make this lease at a nominal rental; but the contract itself concerned no public duty, and its conditions violated no existing obligation of a common carrier.

These considerations were clearly and ably set forth in the learned opinion of the Circuit Court of Appeals. In view of the plain record, we are utterly at a loss to understand why counsel for petitioners persist in misstating the question at issue in this case. They cite and rely upon the decision of this court in *Covington Stock Yards* v. *Keith*, 139 U. S., 128. The doctrine of that case is not questioned. It holds that suitable and sufficient station facilities, such as depots, warehouses and stock yards, are

necessary to the proper discharge of the public duties of a common carrier, in the receipt, carriage and delivery of freight, and that a railway company cannot neglect to provide such accommodations itself, or exact a special charge therefor, if furnished by itself or others. There can be no question that this rule would apply with full force to the defendant company, in the conduct of its business *as a common carrier*, but in the case at bar it did not act or contract in any such relation. It owed no public duty to Simpson, McIntire & Co., and violated none, as Mr. Justice Sanborn has pointed out with great clearness and force. The fallacy of counsel's argument lies in the fact that it fails to distinguish between the public duties and the private rights of this railway company.

But, counsel further contend that, apart from its obligation as a common carrier, this railway company owed to Simpson, McIntire & Co. a separate and additional duty of care not to destroy their property by fire negligently set in the operation of its road, which duty it could not evade by contract. In this inquiry it becomes important to ascertain the situation of the parties, and their relative duties and obligations, before as well as after the making of this lease.

To those who own or occupy land adjoining their tracks, railway companies owe a duty of ordinary watchfulness and care to prevent loss or damage by the escape of fire in the operation of trains. Each party being in the independent exercise of a legal right, both must use reasonable care to avoid injury to the other. But if the same persons come themselves, or bring their property upon the private right of way, without permission, they become *trespassers* in law, and the railway companies are liable only for willful or wanton injury. Numerous decisions of

courts have settled this rule of law, which is equally applicable to persons or property.

Ry. Co. v. *Tartt, Admr.*, 12 Cir. Ct. App., 6.
Crane Elev. Co. v. *Lippert*, 11 Cir. Ct. App., 524.
Morgan v. *R. R. Co.*, 19 Blatch., Cir. Ct. Repts., 239.
Ry. Co. v. *Bennett*, 69 Fed. Reptr., 525.
Kirtley v. *Ry. Co.*, 65 Fed. Reptr., 386.
R. R. Co. v. *Godfrey*, 71 Ill., 506.
R. R. Co. v. *Hetherington*, 83 Ill., 510.
Blanchard v. *Ry. Co.*, 126 Ill., 416.
Wright v. *R. R. Co.*, 142 Mass., 296.
Morrisey v. *R. R. Co.*, 126 Mass., 377.
Chenery v. *R. R. Co.*, 160 Mass., 211.
R. R. Co. v. *Graham*, 95 Ind., 286.
Splittorf v. *State*, 108 N. Y., 213.

Before the execution of this lease, Simpson, McIntire & Co. had no rights whatever upon defendant's ground. Had they erected this cold storage warehouse thereon, without permission, the railroad company could not have been held liable for its destruction by fire set through negligence. Being there either as trespassers or as mere licensees, no active duty of care towards them or their property would be imposed upon the company in the operation of its engines and trains, but only the mere negative obligation of abstaining from willful or wanton injury.

They could not compel the company, against its will, to lease any part of the right of way, or to permit them to erect buildings or store property thereon. For their

own private benefit and advantage Simpson, McIntire & Co. sought to secure privileges which the law did not give them, and which they could acquire only by consent of and contract with the owner of the land. They applied for a lease of ground upon which to erect and maintain a warehouse in close proximity to railroad tracks in daily use, wherein were to be stored butter, eggs and other perishable products. If such permission was granted, without restriction, a new and continuing obligation would thereby be imposed upon the company, namely: the duty of exercising reasonable watchfulness and care to prevent burning this building and contents by fire set through negligence of its servants, whose conduct it could not always supervise or control. This duty did not concern defendant's ordinary business as a common carrier, nor was it a burden which held itself out to the public as undertaking for all who desired to locate upon its right of way. Upon the contrary, it was a duty created and existing wholly by mutual agreement and therefore to be measured by the terms of such contract.

The rai lway company therefore announced, in effect, that it would not consent to assume or carry this additional and perhaps onerous risk, not obligatory upon or beneficial to it, but would grant the desired privileges, at a merely nominal rent, *provided, and upon the express condition only*, that the lessees should carry such risk themselves, and relieve the company therefrom. This proposition was voluntarily accepted by Simpson, McIntire & Co. Both parties stood upon an equal footing, and understood and mutually agreed upon such terms, by executing the lease in question. The lessees occupied under it for the full term, and longer, and having received the benefits now refuse to repudiate the burdens of this

contract. They *disclaim* of record any right to recover for the balance of their loss, beyond the insurance received.

The real situation was clearly and forcibly stated by the Court of Appeals, as follows: "A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care after a lease containing such a contract is executed that it would have been required to exercise if no such agreement had been made. *Express Co.* v. *Caldwell*, 21 Wall, 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employes or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or refuse to make the contract." (70 Fed. Reptr., p. 208.)

Upon this state of facts, we submit that no public policy was violated by enforcing the mutual agreement of these parties. If Simpson, McIntire & Co. saw fit to contract for special privileges upon condition of carrying the attendant risks, wherein were the public prejudiced, or even concerned? Two Massachusetts cases are directly in point.

In *Bates* v. *Old Colony Railroad*, and *Hosmer* v. *Same*, express messengers, holding season tickets over the railroad and desiring to ride in baggage cars for business purposes, contrary to train rules, expressly agreed to assume all risks of injury while there, and to hold the company harmless therefrom. The trains were derailed through negligence of railroad employes, and the messengers received injuries thereby. In the first case,

plaintiff's presence in the baggage car directly contributed to his injuries, but in the latter it did not. In each suit the court held that the contract for immunity was valid and would be enforced, saying:

"It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that in consideration that the defendant would permit him to ride in the baggage car he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties does not arise under this contract as construed in this case."

Bates v. *Old Colony R. R.*, 147 Mass., p. 265–6.

Hosmer v. *Same*, 156 Mass., p. 507.

The same principle is further illustrated by what is known as the "circus-train cases." In June, 1892, this defendant company made a special contract to haul a circus train over its road between certain points on different days and at rates less than the regular tariff for carriage of persons and freight. In consideration of the reduced rate and increased risk it was stipulated that the company should not be liable for any injury to persons or property "from any cause." The train was derailed and part of the circus property destroyed through negligent condition

of the track and running of the train. In a suit to recover such loss the Circuit Court of Appeals for the Seventh Circuit held that the contract was valid and binding, upon the broad ground that the railway company contracted as a private and not as public carrier, and therefore could lawfully stipulate for indemnity against the results of its own negligence.

C., M. & St. P. Ry. Co. v. *Wallace*, 14 Cir. Ct. of App. Repts., 257; *s. c.* 66 Fed. Reptr., 506.

To the same effect are the following authorities:

Coup v. *Ry. Co.*, 56 Mich., 111.

Robertson v. *Ry. Co.*, 156 Mass., 525.

Forepaugh v. *Ry. Co.*, 128 Pa. St., 217.

Piedmont Mfg. Co. v. *R. R. Co.*, 19 So. Car., 353.

The principle is thus stated:

"A common carrier may undoubtedly become a private carrier or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

R. R. Co. v. *Lockwood*, 17 Wall., 377.

Liverpool, &c., Co. v. *Ins. Co.*, 129 U. S., 440.

Hutchinson on Carriers, 2nd Ed., Secs. 44 & 73.

If a railway company can carry an express messenger, or a circus train over its road, as a private and not as a public carrier, upon what legal basis can it be argued that the same company cannot lease its own land to a private partnership upon like terms of immunity from negligence of its servants? Have the public any greater interest in

the latter than in the former contract? Clearly not. We submit that the doctrine of the Bates and Wallace cases are decisive of the rule for which we contend. It is strenuously urged that all contracts which seek to relieve one party from legal liability for its own negligence, or that of its servants, are contrary to public policy and void. The proposition is not universally true. Some contracts are and others are not invalid, upon this ground. For instance, it is well settled, "that the private carrier may by contract with his employer, exonerate himself from liability on account of his inattention or want of diligence or skill in the execution of the trust. He may stipulate that he shall in no event be liable except for fraud or its equivalent."

Hutchinson on Carriers, 2nd Ed., Sec. 40.
Wells v. *Steam Nav. Co.*, 2 Comstock, 204.
Alexander v. *Green*, 3 Hill., 9.

The principle is, that common carriers may become private carriers when, by special contract, they undertake to transport property which it is not their business to carry. This applies to all private bailees for hire. The public carrier, being obliged to serve all equally, within the range of his employment, by common law is forbidden to exact unreasonable or oppressive terms, but the private carrier or bailee is free to impose what condition he will. If accepted, it is mere matter of private contract in which the public are not concerned.

Again, this lease was outstanding when the insurance companies issued their policies upon this warehouse and contents, and they actually knew or were chargeable with knowledge of its terms, including the condition of exemption in question. They voluntarily contracted with Simpson, McIntire & Co. to assume and carry the same risk

of loss by fire negligently set in operation of the railroad, which that firm had previously agreed with the railway company to assume and carry themselves. In other words, these companies insured the lessees against the very risk that such lessees had previously insured their lessor against. *In effect, a re-insurance.*

Upon this point, the Court of Appeals said:

"It goes without saying that the railroad company could have legally employed an insurance company to indemnify it against loss by fire occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had, in effect, insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid." (70 Fed. Reptr., 206.)

In *Phœnix Ins. Co.* v. *Erie Transp. Co.*, 117 U. S., 321, this court held that an insurance contract was not unlawful or against public policy, which directly indemnified a common carrier against loss by fire, occurring through its own negligence, to goods in its possession for carriage, saying:

"No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, *though occasioned by the negligence of his own servants.*" (p. 324.)

So, where an insurable interest in property exists, insurance against loss by one's own negligence is lawful.

Ins. Co. v. *Lawrence*, 10 Peters, 507.
Johnson v. *Ins. Co.*, 4 Allen, 388.
Shaw v. *Roberts*, 6 A. & E., 80.

V.

In support of their contention that this lease was contrary to public policy and void, counsel for petitioners strongly rely upon that line of decisions of which *R. R. Co.* v. *Lockwood*, 17 Wall., 357, and like cases are leading examples, and where this court lay down the rule that common carriers cannot lawfully stipulate with shippers for exemption from the consequences of their own negligence. Your Honors refused to follow decisions of the State of New York upholding such agreements, and the doctrine has since been applied to other contracts of public carriers, both as to passengers and freight. These cases rest upon considerations peculiar to themselves. The stipulations were there made (or exacted) by public carriers *acting in that capacity, and in respect of duties and obligations which they admittedly owed to the public, and in which the state had a direct interest.*

It was said that "the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law."

R. R. Co. v. *Lockwood*, 17 Wall., p. 381.

But even in that case, the court say: "*If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public.*" (p. 379.)

It is to be observed that in the later case of *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, Mr. Justice GRAY, in analyzing and restating the doctrine of the Lockwood opinion, expressly puts it upon *common law principles.* He says: "By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servant's negligence." (p. 439.)

This class of cases is not in conflict with our position because the facts are vitally different. The lease and exemption in question were not *exacted* by defendant, or obtained in its capacity as a common carrier, or in respect of duties obligatory under such relation, out of an unwilling but helpless patron. They were voluntary transactions between parties acting in the private and independent situation of lessor and lessee, and concerning the terms and conditions upon which a leasehold interest in or right to real estate should be created and enjoyed. Simpson, McIntire & Co. had absolutely no right whatever to occupy this land without the owner's consent. Such consent might be given upon terms which they were free to accept or reject. If voluntarily agreed to wherein were the general public concerned, or how did the company evade its public duties as a common carrier? It is conceded that *if* such had been its effect, the statute of Iowa (1 McClain's Code, Sec. 2007), would have avoided the lease. But the Supreme Court of that state in the Griswold case, held that it did not. If this decision is not a construction of state statute which this court should follow, is not its reasoning persuasive and convincing upon the question, considered as one of general law?

The public have a direct interest in the careful performance of those duties which essentially and necessarily inhere in the relation of common or public carrier, and it may well be said to be against public policy to uphold contracts which, in effect, allow the carrier to abdicate or ignore imperative public duties. In this respect the United States have a public policy independent of that of each state. The power to regulate interstate commerce —carriage of persons and property—creates and requires a *national policy* in those respects, which should not be controlled by local and frequently conflicting policies or interests of the several states. These, and other considerations, might well sustain the doctrine of the Lockwood case, and similar decisions, without affecting in the least the rule for which we contend.

In *Hart* v. *Ry. Co.*, 112 U. S., 331, it was held not to be contrary to public policy for a common carrier of goods to stipulate for an agreed (low) valuation in the event of loss by its own negligence.

Again: The class of cases which hold that it is contrary to public policy for an employer to exact from the employe, as a condition of employment, release of liability for personal injuries thereafter sustained by negligence of the master or his servants (of which *R. R. Co.* v. *Spangler*, 44 Ohio St., 441, is an example), rest upon peculiar and entirely different considerations. In the first place, it is well said that the state has a direct interest in the lives of its citizens. The welfare and prosperity of the public are concerned in the preservation of the lives and limbs of its members. A mutilated man is a burden, and a dead man a loss to society. The life and service of each individual is of value to the state. Intentionally or negligently to deprive it of either, is forbidden by positive

law and public policy. Another reason is found in the *disparity* between the contracting parties. They do not stand upon the same footing or contract with equal freedom. The working man must labor, the capitalist is not compelled to hire. Such contest is unequal, and the weaker party is practically forced to barter away rights in which the public are interested.

It was this very thought of inequality and subjection which largely influenced this court in the Lockwood and similar decisions, when it was said:

"*The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice, etc.*"

GRAY, J., in *Liverpool Steam Co.* v. *Ins. Co.*, 129 U. S., 441.

BRADLEY, J., in *R. R. Co.* v. *Lockwood*, 17 Wall., 379.

But these forceful reasons have no application to contracts of indemnity against negligence, where mere *property* is concerned; where the parties stand upon a perfect equality, and where capital seeks the use of private land for private purposes. We submit that no well considered case invalidates a contract like the one at bar. It should be added that all these considerations received attention in the learned and exhaustive opinion of the Court of Appeals in this case, (pp. 204, 205) and its conclusion was expressed thus:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. *U. S.* v. *Trans-Missouri Freight Assn.*, 7 C. C. A., 15, 82, 58 Fed., 58; *Printing and Registering Co.* v. *Sampson*, L. R., 19 Eq., 462; *Tallis* v. *Tallis*, 1

El. & Bl., 291; *Rouisillon* v. *Rousillion*, 14 Ch. Div., 351, 365; *Stewart* v. *Transportation Co.*, 17 Minn., 372, 391 (Gil., 348); *Marsh* v. *Russell*, 66 N. Y., 288; *Phippen* v. *Stickney*, 3 Metc. (Mass.), 384, 389. In our opinion, the plaintiffs in error fall far short of sustaining this burden."

Hartford Fire Ins. Co. v. *C., M. & St. P. Ry. Co.*, 70 Fed. Reptr., 207.

VI.

THIS LEASE WAS ALSO VALID, UNDER THE LOCAL LAW AND POLICY OF IOWA RELATING TO FIRES SET BY RAILWAYS.

In the concluding portion of their brief, counsel for petitioners assert that "there is a uniform and universal public policy against permitting the negligent setting out and escape of fires." (p. 13.) We concern ourselves with this proposition only in so far as it affects the particular state of facts in controversy. It is unquestioned that the State of Iowa has a definite and settled *policy* in respect to liability for fires set in operation of railways within its borders, and that such policy is declared in its statutes and judicial decisions.

1 McClain's Ann. Code of Iowa, Sec. 1972 (old Sec., 1289), provides: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, etc."

In the Griswold case it was contended that a similar exemption in a railroad lease was obnoxious to this statute and opposed to the public policy of Iowa, but, in holding otherwise, the Supreme Court of that state, said:

"The former opidion holds correctly that the liability of railroad corporations, under section 1289 (1972), for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exer-

cise care is towards the public; *but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff.* The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision in section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. * * * This is not a question whether, under section 1289 (1972), the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question."

Griswold v. *Ill. Cent. R. R. Co.*, 90 Ia., p. 270.

See, also, the Iowa Code, Sec. 1308 (1 McClain's Ann. Code, Sec. 2007), provides that:

"No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist, had no contract, receipt, rule or regulation, been made or entered into."

As to this section, the court further said:

"It is contended that the defendant entered into this contract *in its capacity as a common carrier*, and therefore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable." (p. 272.)

By the above quotations it will be seen that the Iowa court construed these sections of the local statute, and expressly held that they did not invalidate the provision or covenant in that lease which relieved the railroad company from liability for fires negligently set by employes in the operation of its road. It was decided that the facts did not bring the case within those statutes, or the policy of the law as declared therein. We contend, therefore, that so far as the question rests upon statutory interpretation, this court will feel bound to follow that decision, upon the principle that local construction of state statutes is binding upon Federal courts. As said by Mr. Justice SANBORN:

"It constitutes an authoritative construction of the statutes of the states." (70 Fed. Reptr., 203.)

It is also evident that the Supreme Court held these statutes to be declaratory of the *public policy* of the State of Iowa, in respect to the very question at issue in this

case, and decided that such policy was not violated by the lease in question: This, in regard to a matter of local concern—the creation of a leasehold interest in or right to real estate within its own borders. This lease created and conveyed an interest in real property within the State of Iowa, upon a certain *condition precedent*. The leasehold estate was to vest only upon condition that the lessor be exempt from liability for damage caused by use of adjoining premises. The validity of this condition directly concerned, and indeed controlled the existence of the lease itself. If legal, the estate vested and there is no liability for loss by this fire. If illegal, no estate was created and Simpson, McIntire & Co. occupied these premises without right or authority.

"As to conditions precedent strict performance is required, and if it becomes impossible from any cause, the estate cannot vest."

Wood's Landlord & Tenant, p. 435.

"A condition precedent is one to be performed before the leasehold estate can vest. But if the performance is impossible *or unlawful*, no estate will vest under the condition."

12 Am. & Eng. Ency. of Law, p. 1000.

Now, the highest judicial tribunal of the state wherein this land is situated, has determined that such *condition* of the lease was valid; that it was not repugnant to any statute or obnoxious to any policy of the State of Iowa. The Griswold case constitutes a local rule for that state. It holds that leasehold title to real estate may be lawfully created and conveyed upon condition that the grantee assumes all risk of fire set by use of the adjoining premises. By affirming the legality of this condition, which is *precedent* to the vesting of the estate, it necessarily settles the

validity of the title itself. Does not this opinion, applied to the facts at bar, sustain all leasehold estates in Iowa land created upon like conditions? Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson v. *Chew*, 12 Wheaton, 153.
Green v. *Neal's Lessee*, 6 Peters, 291.
Swift v. *Tyson*, 16 Peters, 18.
Suydam v. *Williamson*, 24 How., 427.
Beauregard v. *N. O.*, 18 How., 497.
Williams v. *Kirtland*, 13 Wall., 306.
R. R. Co. v. *Natl. Bank*, 102 U. S., 57.
Bondurant v. *Watson*, 103 U. S., 281.

In *Jackson* v. *Chew*, this court, in 1827, followed decisions of the New York courts settling a rule of construction of devises of real estate, saying:

"This court adopts the state decisions, because they settle the law applicable to the case; *and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the state, when applied to the title of lands.* And such a course is indispensable in order to preserve uniformity; otherwise the peculiar constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion." (p. 167.)
"And whether these rules of land titles grow out of the statutes of a state or principles of the common law adopted and applied to such titles can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other." (p. 168.)

The same reason was also forcibly expressed in the later case of *Green* v. *Neal's Lessees*, *supra*, where this court, reversing its former holding, followed a decision of the

Tennessee court as to the construction of a state statute of limitations affecting title to real estate.

The court said:

"Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the Federal and state governments, that there should be but one rule of property in a state." (p. 300.)

Suppose the defendant having executed this lease, had refused to give possession of the demised premises, and Simpson, McIntire & Co. had sued therefor, in the state court. If the company should defend upon the ground that the lease was void and conveyed no legal title to or right of possession of the land, because made upon a condition contrary to public policy, would not the Iowa court, following the rule of the Griswold case, promptly give judgment awarding possession to the tenants? Would not such a decision establish *a local rule* for that state? Would this court, in a similar case, refuse to follow such rule and hold the lease invalid as against a supposed public policy, and thereby establish two different policies for, and create two conflicting rules of property in the same state?

But, granting that the Griswold case did not establish what is strictly termed a "rule of property," still it remains that the question was largely, if not entirely, *local* in its nature and in respect to which the State of Iowa had a settled policy of its own, which was declared in that suit. In general, the public policy of a state means the *local self-interest* of that commonwealth. What that shall be, must necessarily be determined by the state itself. No other state can decide for it; the United States cannot.

For instance, each state must judge for itself what its *policy* shall be towards corporations of another state. It may admit or exclude them, arbitrarily. It may receive them upon such terms as it sees fit to exact, and neither the state creating the corporation, nor the Federal government, can object or interfere. This doctrine has been carried so far that this court has refused to interfere with the action of the State of Wisconsin in revoking the license of a foreign insurance company, because it removed a suit against it, from the state into the Federal court, contrary to the laws of that state.

Doyle v. *Ins. Co.*, 94 U. S., 535.

This local self-interest or policy of a state may change from time to time, just as that of an individual. Different conditions may affect or control it. Of these, it must necessarily judge for itself, unhampered by the control of any other state, or of the United States. Another sovereignty might possibly decide more wisely what was for the best interests of Iowa, but, it alone, has the final power to determine what its own policy shall be; so, also, with the national government as to those interests confided exclusively to its charge. This public policy of a state is usually evidenced by its written laws. Statutes are declaratory of the policy of the state in a given matter; but, in the absence of legislative declaration, such policy is ascertained and announced by its judicial decisions. Indeed, public policy is to be sought from decisions as well as statutes, because the policy of a state is the law of that commonwealth, whether enacted by statutes or expressed by courts. This doctrine has been recognized by Federal courts from an early time. They have uniformly declined to make or control a local policy for any state, but have contented themselves with ascertaining such policy

from the statutes or decisions of the particular state, and then following it.

Thus in 1839, in the leading case of *Bank of Augusta* v. *Earle*, 13 Peters, 519, this court, in considering the power of corporations created by one state, to make contracts and do business in another state, say:

"The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out by a definite and distinct line the complex and intricate question of political economy. * * * How can this court with no other aid than her general principles asserted in her constitution, with her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would without doubt choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of the United States from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state for this court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation." (p. 594.) * * * "*When a court is called on to declare contracts thus made, to be void upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct to justify the court in sustaining the defense.*" (p. 597.)

So, also, in *Vidal* v. *Girard's Executors*, 2 Howard, 127, this court, in sustaining a devise of Stephen Girard to the City of Philadelphia for the establishment of a college for poor orphan boys, upon certain principles therein prescribed, say, STORY J.:

"This objection is that the foundation of the college upon the principles and exclusions prescribed by the tes-

tator, is derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania. * * * In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which indeed we can know nothing), nor to consider whether the scheme of education by him prescribed is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. Above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. *We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws and decisions necessarily bring before us.*" (p. 197–8.)

In *Teal* v. *Walker*, 111 U. S., 242, a statute of Oregon provided that a mortgage of real property should not be deemed a conveyance so as to enable the mortgagor to recover possession of the estate, without foreclosure and sale by law. The mortgage in question stipulated that the mortgagor would deliver possession upon default in payment of the mortgage debt. In holding such provision void, this court say, WOODS, J. :

"That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, *and although not expressly prohibited by law, yet like all con-*

tracts opposed to the public policy of the state, it cannot be enforced." (p. 252.)

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555, a statute of Massachusetts forbade traveling on Sunday except for necessity or charity, under penalty of a fine. Plaintiff was injured while riding upon the railway in violation of this statute. State cases had held that there could be no recovery for personal injuries received under such circumstances, and this court, MILLER, J., followed such decisions as establishing the local law of Massachusetts on that subject, although not agreeing with their reasoning or conclusion, saying:

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property, as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the Federal courts."

In *City of Detroit* v. *Osborne*, 135 U. S., 492, a personal injury had resulted from negligence of the city in failing to keep its street in repair. Under statutes of Michigan the power and duty to keep streets in repair was vested in the state, but the Supreme Court of that state had decided that such duty was merely to the public and not to private individuals, and that its neglect gave no right of action to a person injured thereby. This court held that such decisions settled the local law of Michigan and must be followed, although opposed to its own reasoning.

It was said by BREWER, J.:

"But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact

remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning and conclusion of that court is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts and all its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law. It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of Federal law and the interpretation placed upon it by the Federal courts, *it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the state, and that law is not what this court might determine, but what the Supreme Court of the state has determined.*"

In *Etheredge* v. *Sperry*, 139 U. S., 266, this court also held that Iowa decisions holding chattel mortgages to be valid in that state, which expressly provided that the mortgagor should remain in possession and sell the mortgaged property in the usual course of trade, established a rule of property or local law, and would be followed by Federal courts. BREWER, J.:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily at least, a matter of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will

accept the settled law of each state as decisive in respect to any case arising therein."

See, also:

Chicago Bank v. *Kansas City Bank*, 136 U. S., 235.

Brown v. *Furniture Co.*, 7 Cir. Ct. App., 225.

Swann v. *Swann*, 21 Fed. Rep., 299.

Under the doctrine of these cases, we think that the question of public policy, in regard to contracts of immunity for the negligent setting of fires by railway trains, under circumstances like those at bar, may well be held to be local to the State of Iowa, and settled by its courts adversely to petitioner's contention here. The precise point, however, was not necessary to the decision of this case, and should not be made the occasion of review by this honorable court, as it has now become merely a moot question in the case.

In conclusion, we have only to say that these insurance companies solicited and took the risk upon this warehouse and contents, presumably at a rate based upon the added exposure to fires from passing trains, and now seek to reap where they have sown not, by invoking a supposed public policy to recover what they received full consideration for assuming. We submit that the claim does not strongly appeal to an enlightened public policy, and that the Circuit Court of Appeals were right in so declaring.

Respectfully submitted.

CHARLES B. KEELER,
Counsel for Defendant in Error.

FILED
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JAMES H. McKENN

IN THE

reme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 116.

The Hartford Fire Insurance Company et al.,
Plaintiffs in Error,

vs.

icago, Milwaukee & St. Paul Railway Company,
Defendant in Error.

RIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE R. PECK,
CHARLES B. KEELER,
Counsel for Defendant in Error.

The Rawleigh Printing Company, 99 Madison St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1897.

No. 115.

The Hartford Fire Insurance Company et al.,
Plaintiffs in Error,

vs.

Chicago, Milwaukee & St. Paul Railway Company,
Defendant in Error.

STATEMENT OF THE CASE.

This cause has been brought into this court by writ of *certiorari* to the Circuit Court of Appeals for the Eighth circuit.

The facts as disclosed by the record are as follows:

February 1, 1890, Simpson, McIntire & Co. leased from the defendant railway company, for a term of one year, a portion of its station grounds at Monticello, Iowa, for the purpose of erecting and maintaining thereon a cold-storage warehouse in close proximity to the railroad tracks. The money rental was but $5 a year, but the lease contained a provision—out of which this litigation arises—as follows:

"Upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of, any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company." (Rec., 14.)

Under the terms of this lease, Simpson, McIntire & Co., entered upon the demised premises and erected thereon a cold-storage warehouse. After the expiration of the year they continued in possession under the terms and conditions of the original lease until November 11, 1892, when the building and contents were destroyed by fire. At the time of the fire, Simpson, McIntire & Co. held insurance policies in the plaintiff companies upon the warehouse and its contents, upon which policies of insurance the plaintiff companies paid to Simpson, McIntire & Co. the aggregate sum of $23,450. Having paid this amount, and considering that they had thereby become subrogated *pro tanto* to the rights of the insured, they brought this suit in May, 1893, against the defendant railway company, to recover the amount so paid, alleging that the fire was occasioned by the negligence of the defendant company in the operation of its trains.

The suit was begun in the District Court of Jones County, and removed by the defendant to the Circuit Court of the United States for the Northern district of Iowa.

In defense of the action, the defendant railway company pleaded its exemption from liability under and by virtue of the above quoted clause in the lease. Plaintiffs demurred upon the ground that the exemption from liability for negligence contained in the lease was contrary to public policy and void.

At the argument it appeared that the Supreme Court of Iowa in the case of *Griswold* v. *Illinois Central Railroad Company*, 90 Iowa, 265, had, in 1892, held in an opinion never officially reported that a similar exemption in a lease made by a railroad company was opposed to public policy and void, but upon rehearing, had reached an opposite conclusion, and had finally held, in 1894, that such exemption was not contrary to the public policy of the State of Iowa, but was lawful and would be enforced by the courts of that state. It also reaffirmed its decision by denying a second rehearing.

Griswold v. *Illinois Central R. R. Co.*,
90 Iowa, 265.

At the Circuit, the case was argued before SHIRAS, J., who without expressing an opinion upon the question considered as an original one, held that he was bound to follow the decision of the Supreme Court of the state upon a question of public policy of the state. (Rec., 19.)

The court thereupon overruled the demurrer, and plaintiffs electing to stand thereon, judgment was rendered for the defendant with costs. Plaintiffs sued out a writ of error to the Court of Appeals of the Eighth Circuit, and upon argument before that court, SANBORN, J., announced the decision of the court in an opinion affirming the judgment below, upon the broad ground that the exemption in question was not

contrary to public policy as a matter of general law, but was valid and enforceable.

A writ of certiorari was issued by this court, and the case stands for argument upon the sole question of the validity of the exemption from liability contained in the lease.

BRIEF AND ARGUMENT.

We submit two propositions:

(1.) The decision of the court of last resort of any state as to the public policy of that state, is conclusive and binding upon all other courts, state and federal.

(2.) Even if the Supreme Court of Iowa had not passed upon the question, the Circuit Court of Appeals was clearly right in deciding, as a general proposition, that the exemption contained in the lease is not contrary to public policy and is, therefore, valid.

I.

Inasmuch as the provision of the contract exempting the defendant company from liability for negligence is attacked on the ground that it is against public policy, it is proper that we should first inquire what is the meaning of the term "public policy"? It is constantly found in the law books and judicial decisions, and has been frequently defined, although it has not received that exact and precise definition which might be given if there were some fixed and unalterable standard by which it could be determined. It varies in different states and

countries, and even in localities of the same state or country. It changes with the advance of civilization, with variations in climate, with physicial and political conditions, and even with the growth of states. As was said in *Davis* v. *Davis*, 36 L. R. Chancery Div., 359:

> "One thing I take to be clear, and that is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities and opportunities of the public."

This court by BROWN, J., in *Pope Manufacturing Co.* v. *Gormully*, 144 U. S., 233, used this language:

> "The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."

Starting then, with the admitted premise that public policy is in its nature variable, let us inquire what the term means; what relation it bears to the affairs and dealings of men with each other? It may be comprehensively stated that the public policy of a state means the local self-interest of that commonwealth. It looks to the public good, and does not permit the people of that state or country to enforce contract obligations which are injurious to the public. The Supreme Court of Illinois, in *People* v. *Gas Trust*, 130 Ill., 294, stated the doctrine thus:

> "Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."

Accepting as a sound statement of the doctrine of public policy that it forbids agreements between private individuals which have a tendency to injure the public, we immediately encounter the difficulty of determining what

is and what is not injurious to the public welfare. Obviously on such a question, minds will differ. The political, economic and ethical views of different individuals will lead them to different conclusions as to what is detrimental to the general welfare. We must, therefore, find some acknowledged standard by which courts can act in determining so difficult a question. That standard is found, and only found, in the constitutions, laws and judicial decisions of the state or the country in which the question arises.

STATE PUBLIC POLICY AND NATIONAL PUBLIC POLICY. There is a public policy of the state and a public policy of the Nation, because each, within the limits of its own sovereignty is supreme, and each may determine for itself what is or is not against the public good.

SHIRAS, J., at the Circuit, very clearly pointed out, in this case, the distinction between state public policy and national public policy. He says:

> "The subject matter of the contract may be such that it affects the country at large, or it may be local in its nature. The nature of the subject matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words, there is a public policy of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and coextensive with the boundaries of the union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control." (Rec., p. 21) 62 Fed. Rep., 906.

Immediately following the language we have quoted above, Judge SHIRAS points out how the public policy of

the state and how the public policy of the nation are to be ascertained. He says:

> "In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the constitution of the United States, the statutes enacted by Congress, and the decisions of the courts, federal and state; and in case there should be a divergence in the views of the federal and state courts upon a question of national public policy, the conclusion reached in the Federal courts must be accepted as the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the state towards a subject within state control, the principal sources of information are the state constitution and statutes, and the decisions of the courts, state and federal; and, in case of a divergence between them, the decisions of the state court must be accepted as the best evidence of the public policy of the state. *Vidal* v. *Girard's Ex'rs.*, 2 How., 127-197; *Swann* v. *Swann*, 21 Fed., 299." (Rec., p. 21.) 62 Fed. Rep., 906.

We are thus brought to the question whether the public policy which has been invoked by plaintiffs in error against the exemption from liability found in the terms of the contract, is the public policy of the State of Iowa or the public policy of the United States. If we are to look to the public policy of Iowa for a determination as to the validity of the contract, we shall discover that public policy in the decisions of its Supreme Court; there we shall find the authoritative announcement of what is good and what is bad for the common weal. It is a great responsibility; but it is wisely placed upon the court whose decision is last, and to which all must look for guidance. The courts of another sovereignty might possibly decide more wisely what is best for the public welfare of Iowa than her own courts, but each

state must determine for itself what its public policy shall be, what rules of conduct and morals are best for the well-being of its inhabitants. The decisions of a court of last resort in a state are as conclusive in determining the law of the state—that is to say the public policy of the state which *is* law—as are the constitution and statutes of the state. Written laws declare the policy of a state, but when legislatures are silent, the court of last resort is the sovereign voice in which laws and policies find final expression. All courts recognize this doctrine, and the Federal courts from an early time have sanctioned and enforced it. They have uniformly refused to assume the power of making or controling local policy, but have been content to ascertain and follow it as announced by the decisions of the highest court of the state.

As far back as 1839, in the leading case of *Bank of Augusta* v. *Earle*, 13 Peters, 519, this court, in considering the power of corporations created by one state, to make contracts and do business in another state, said, by TANEY, C. J.:

"The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out by a definite and distinct line the policy which Alabama has adopted in relation to this complex and intricate question of political economy? * * * How can this court, with no other aid than her general principles, asserted in her constitution, and her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would, without doubt, choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of

the United States from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state for this court to forestall its decisions, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation." (p. 594.) * * * "*When a court is called on to declare contracts thus made, to be void upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct, to justify the court in sustaining the defense.*" (p. 597.)

So, also, in *Vidal* v. *Girard's Executors*, 2 Howard, 127, this court, in sustaining a devise of Stephen Girard to the City of Philadelphia for the establishment of a college for poor boys, upon certain principles therein prescribed, say, STORY, J.:

"The objection is that the foundation of the college upon the principles and exclusions prescribed by the testator, is derogatory and hostile to the christian religion, and so is void as being against the common law and public policy of Pennsylvania. * * * In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which, indeed, we can know nothing), nor to consider whether the scheme of education by him prescribed is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interest and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. Above all, when that topic is connected with religious polity, in a country

composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. *We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws and decisions necessarily bring before us.*" (Page 197-8.)

In *Teal* v. *Walker*, 111 U. S., 242, this court, by WOODS, J., used the following language:

"That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, *and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced.*" (P. 252.)

This doctrine is perfectly familiar and one might almost say that an apology is due to the court for quoting from its own decisions to enforce it. Nowhere has it been more emphatically stated than in *City of Detroit* v. *Osborne*, 135 U. S., 492, by BREWER, J. He says:

"But, even if it were a fact that the universal voice of the other authorities were against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning and conclusion of that court is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts and all of its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law. It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of federal law and the interpretation placed upon it by the Federal courts, *it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be in all*

matters of a local nature, but one law within the state, and that law is not what this court might determine, but what the Supreme Court of the state has determined."

In the above language this court has disclaimed any right or authority to decide questions of state public policy. It followed the decision of the Supreme Court of Michigan, and held that the decision of that court upon a question of the public policy of that state, was conclusive upon this court.

We pass from this branch of the discussion, for there is little in it to discuss. The law is acknowledged and settled by repeated decisions, that this court and all Federal courts will follow the decisions of the court of last resort of any state upon questions of the constitution, laws and public policy of that state.

THE QUESTION OF PUBLIC POLICY INVOLVED IN THIS CASE IS PURELY LOCAL TO THE STATE OF IOWA. We have shown that on questions of state public policy, the decisions of the Supreme Court of the state are conclusive.

The Supreme Court of Iowa having passed upon this question—having determined the public policy of that state in respect to such a contract as this—the only escape from the effect of the decision of that court is to assert that the question is not one of state public policy, but of national public policy, or of some general policy which is neither state or national.

That the contract and all of its provisions were entirely within the cognizance of the laws of Iowa is perfectly plain. All of its provisions might have been the subject of state legislation, The state might, by statute, have authorized or forbidden such exemptions as the one contained in this lease, and would anybody claim that

such legislation is beyond the competency of the state to enact? Suppose, for instance, the legislature of Iowa had passed a statute containing this provision: "No contract containing an exemption from liability for negligence shall be valid in this state:" Would anyone claim for a moment that such a statute was not within the power of the state? There is not a statute book of any state in the Union which does not contain numerous provisions fixing liability for negligence and regulating that subject as one of local concern. The contract in question was one establishing the relation of landlord and tenant. It vested in the lessees an estate or interest in lands; it gave to the tenant certain rights of user and enjoyment and it reserved to the landlord, as a condition of the lease, an exemption from liability for negligence. All of its terms and covenants were to be performed in Iowa, and it is impossible to conceive of a contract more purely local in its character than this. All the rights which the lessor company had in the demised property; all the rights it enjoyed in the operation of its railway; all the powers of contract which belonged to it came from the State of Iowa. The sole power to hold and enjoy its right of way was derived from the state. The state, therefore, could impose the terms upon which it should be held and enjoyed. It could define and fix all the liabilities and immunities of the railway company in respect to it. The state might have positively forbidden the railway company to demise any portion of its right of way; but it did not do so, and the railway company, having the acknowledged right to demise the premises in controversy in this case, could impose as a condition of the lease, any terms not forbidden by the statutes or the policy of the state, as an-

nounced by its courts. Numerous statute laws have declared what shall be the rights, the obligations and the liabilities of railway companies in Iowa. No one doubts that the state might have gone farther and enacted that if the defendant company should lease any of its property, it should not reserve an exemption from liability for negligence; but the state in its wisdom refrained from enacting any such statute, and the Supreme Court of Iowa has decided that in the absence of such a statute, a railway company may reserve in a contract of lease an exemption from liability for negligence, without violating the public policy of the state. Such a decision is as much a determination of what the law of Iowa is, as it would be if it were enacted in a positive statute. We may say of it, what Justice BREWER said of the decision of the Supreme Court of Michigan in *City of Detroit* v. *Osborne*, *supra*:

"The fact remains that the decision of that court, *undisturbed by legislative action*, is the law of that state."

It is conceded that the question whether a railroad company in Iowa, when it leases a portion of its right of way, may reserve an exemption from liability for negligence, is absolutely "undisturbed by legislative action," so that we have here this curious—not to say absurd—situation: The plaintiffs bring a suit founded entirely upon a supposed public policy of the state, and after the Supreme Court of the state has decided that plaintiffs were mistaken in their view of public policy, they insist that the decision does not settle what is the public policy of the state.

Griswold v. *Illinois Central Railroad Company*, 90 Iowa, 265, is the case which determines the public policy of the State of Iowa on this question. It was the case

which Judge Shiras followed, on the distinct ground that he was bound to recognize the right of the Supreme Court of the state to decide what is the public policy of the state. There is no room for discussion that the question involved in the Griswold case was precisely the question involved in this case. Justice GIVEN in announcing the decision of the Supreme Court of Iowa in the Griswold case stated it thus:

"It will be seen from the statement of the case that the controlling question is whether that clause of the lease whereby plaintiff Griswold agrees to protect and save harmless the defendant from all liability for damages by fire negligently communicated to the property on the leased premises in the operation of the railroad is void as against public policy."

The court held that it was not; and Judge Shiras did what all courts are bound to do—he left to the Supreme Court of the state the determination of what is the public policy of the state.

As we have shown above, every question that can arise as to the liability of railway companies for fires or for other consequences arising from negligence or mischance of any kind, are within the competency of the state to regulate by written statutes. The legislature of Iowa has adopted various statutes fixing liability for fires arising from the operation of railroads and the Supreme Court of that state in the Griswold case held that under none of them was the defendant company forbidden to protect itself from liability by the exemption in the lease, out of which this litigation arises.

THIS LEASE WAS VALID, UNDER THE STATUTE LAW, AND LOCAL POLICY OF IOWA, RELATING TO FIRES SET BY RAILWAYS.

Counsel for plaintiffs in error say that "statutes will be found everywhere holding railway companies to a stricter liability for setting out fires than that imposed by the common law rules of negligence. But no statutes can be found anywhere which attempt to exempt railway companies from liability for damages for fires negligently set out by their locomotives." From these premises they draw the deduction that "*the conclusion is irresistible of a general and universal public policy against permitting fires to be set out by railways, in the operation of their trains and against exempting railways from liability for such fires when set out by them.*"

It is unquestioned that the State of Iowa has a definite and settled *policy* in respect to liability for fires set in operation of railways within its borders, and that such policy is declared in its statutes and judicial decisions.

1 McClain's Ann. Code of Iowa, Sec. 1972, provides:

"That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, etc."

In the Griswold case it was contended that an exemption in a railroad lease was obnoxious to this statute and opposed to the public policy of Iowa, but, in holding otherwise, the Supreme Court of that state, said:

"The former opinion holds correctly that the liability of railroad corporations, under section 1289 (1972), for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exercise care is towards the public; *but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff.* The de-

fendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision in section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. * * * This is not a question whether, under section 1289 (1972), the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question."

Griswold v. *Ill. Cent. R. R. Co.*, 90 Ia., p. 270.

See, also, the Iowa Code, Sec. 1308 (1 McClain's Ann. Code, Sec. 2007), which provides that:

"No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist, had no contract, receipt, rule or regulation, been made or entered into."

As to this section, the court further said:

"It is contended that the defendant entered into this contract *in its capacity as a common carrier*, and there-

fore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable." (p. 272.)

By the above quotations it will be seen that the Iowa court construed these sections of the local statute, and expressly held that they did not invalidate the provision or covenant in that lease which relieved the railroad company from liability for fires negligently set by employes in the operation of its road. It was decided that such a case was not within these statutes, or the policy of the law as declared therein. It is clear, therefore, that so far as the question rests upon statutory interpretation, this court is bound to follow that decision, upon the principle that local construction of state statutes is binding upon Federal courts. As said by SANBORN, J.:

"It constitutes an authoritative construction of the statutes of the states." (70 Fed. Reptr., 203.)

It can not be denied that the Supreme Court of Iowa held these statutes to be declaratory of the *public policy* of the state, in respect to the very question at issue in this case, and decided that such policy was not violated by the lease in question. This, in regard to a matter of local concern—the creation of a leasehold interest in or title to

real estate within its own borders. Under the law this lease created an interest in "real estate," and conveyed a title to "real property," within the purview of the Iowa statute.

"REAL PROPERTY. 8. The word 'land,' and the phrases 'real estate' and 'real property' include lands, tenements, hereditaments, *and all rights thereto and interests therein*, equitable as well as legal."

1 McClain's Ann. Code, p. 11, Sec. 49.

The lease, moreover, created and conveyed an interest in real property within the State of Iowa, *upon a certain condition precedent*. Such leasehold estate was to *vest only upon express condition* that the lessor be exempt from liability for damage caused by use of its adjoining premises. The validity of this condition directly concerned, and indeed controlled the very existence of the lease. If legal, the estate vested and there is no liability for loss by this fire. If illegal, no estate was created or title conveyed, and Simpson, McIntire & Co. occupied these premises without right or authority.

"As to conditions precedent strict performance is required, and if it becomes impossible from any cause, the estate cannot vest."

Wood's Landlord & Tenant, p. 435.

"A condition precedent is one to be performed before the leasehold estate can vest. But if the performance is impossible or *unlawful*, no estate will vest under the condition."

12 Am. & Eng. Ency. of Law, p. 1000.

Now, the highest judicial tribunal of the state wherein this land was situated, has determined that such *condition* of a lease is valid; that it is not repugnant to any statute or obnoxious to any policy of the State of Iowa.

The Griswold case constitutes a local rule for that state. It holds that leasehold title to real estate may be lawfully created and conveyed upon condition that the grantee assumes all risk of fire set by use of the adjoining premises. By affirming the legality of this condition, which is *precedent* to the vesting of the estate, it necessarily settles the validity of the title itself. Does not this opinion applied to the facts at bar, sustain all leasehold estates in Iowa land created upon like condition? Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson v. *Chew*, 12 Wheaton, 153.
Green v. *Neal's Lessee*, 6 Peters, 291.
Swift v. *Tyson*, 16 Peters, 18.
Suydam v. *Williamson*, 24 How., 427.
Beauregard v. *N. O.*, 18 How., 497.
Williams v. *Kirtland*, 13 Wall., 306.
R. R. Co. v. *Natl. Bank*, 102 U. S., 57.
Bondurant v. *Watson*, 103 U. S., 281.

In *Jackson* v. *Chew*, this court in 1827, followed decisions of the New York courts settling a rule of construction of devises of real estate, saying:

"This court adopts the state decisions, because they settle the law applicable to the case; *and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute laws of the state, when applied to the title of lands.* And such a course is indispensable in order to preserve uniformity; otherwise the peculiar constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion." (p. 167.)
"And whether these rules of land titles grow out of the statutes of a state or principles of the common law, adopted and applied to such titles can make no difference.

There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other." (p. 168.)

The same reason was also forcibly expressed in the later case of *Green* v. *Neal's Lessee's*, *supra*, where this court, reversing its former holding, followed a decision of the Tennessee court as to the construction of a state statute of limitations affecting title to real estate.

The court said:

"Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the Federal and state governments, that there should be but one rule of property in a state." (p. 300).

Suppose the defendant having executed the lease, had refused to give possession of the demised premises, and Simpson, McIntire & Co. had sued therefor, in the state court. If the company should defend upon the ground that the lease was void and conveyed no legal title to, or right of possession of the land, because made upon a condition contrary to public policy, would not the Iowa court, following the rule of the Griswold case, promptly give judgment awarding possession to the tenants? Would not such a decision establish *a local rule* for that state? Would this court, in a similar case, refuse to follow such rule and hold the lease invalid as against a supposed public policy, and thereby establish two different policies for, and create two conflicting rules of property in the same state?

But, granting that the Griswold case did not establish what is strictly termed a "rule of property," still it re-

mains that the question was largely, if not entirely, *local* in its nature, and in respect to which the State of Iowa had a settled policy of its own, which was declared in that suit. *In general, the public policy of a state means the local self-interest of that commonwealth.* What that shall be, must necessarily be determined by the state itself. No other state can decide for it; the United States cannot decide for it. For example, each state must judge for itself what its *policy* shall be towards corporations of another state. It may admit or exclude them, arbitrarily. It may receive them upon such terms as it sees fit to exact, and neither the state creating the corporation, nor the Federal government, can object or interfere. This doctrine has been carried so far that this court has refused to interfere with the action of the State of Wisconsin in revoking the license of a foreign insurance company, because it removed a suit against it, from the state into the Federal court, contrary to the laws of that state.

Doyle v. *Ins. Co.*, 94 U. S., 535.

This local self-interest or policy of a state may change from time to time, just as that of an individual. Different conditions may affect or control it. Of these, it must necessarily judge for itself, unhampered by the control of any other state, or of the United States. True, as we have already said, another sovereignty might decide more wisely what was for the best interests of Iowa, but, it alone, has the final power to determine what its own policy shall be; so, also, with the national government as to those interests confided exclusively to its charge. This public policy of a state is usually evidenced by its written laws. Statutes are declaratory of the policy of the state in a given matter; but, in the absence of legislative declaration, such policy is

ascertained and announced by its judicial decisions. Indeed, public policy is to be sought from decisions as well as statutes, because the policy of a state is the law of that commonwealth, whether enacted by statutes or expressed by courts. This doctrine has been recognized by Federal courts from an early time. They have uniformly declined to make or control a local policy for any state, but have contented themselves with ascertaining such policy from the statutes or decisions of the particular state, and then following it.

Bank of Augusta v. *Earle*, 13 Peters, 519.
Vidal v. *Girard's Executors*, 2 Howard, 127.
Teal v. *Walker*, 111 U. S., 242.
City of Detroit v. *Osborne*, 135 U. S., 492.

The foregoing considerations were stated by SHIRAS, J., at the circuit, as follows:

"The stipulations in the lease, so far as they affect this case, deal only with the duty and obligation resting upon the defendant company growing out of the fact that the company, in its business, uses the dangerous agency of fire. The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state, and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick or other material when built in cities or in close proximity to other buildings. The state, by legislation, may

establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads. When providing for the acquisition or condemnation of the right of way, the state may declare the public uses to which the right of way may be subjected. Can there be any doubt that the state may empower the railway companies to contract with third parties for the erection of warehouses or elevators on the right of way, to be used for the reception and storage of grain and other products, preparatory to shipment upon the railway, and that the state can define the extent of the liability of the railway companies for damages resulting to such property from fires caused by the operation of trains upon the railway? These considerations, and others of like import which might be suggested, clearly show that it is a matter within *state control* to determine the extent of the liability for injury by fire resulting from the operation of railway trains under charters or authority granted by the state. Therefore, when the question arises whether a given contract, intended to define or limit the liability of a railway company with respect to injury resulting from fires, is valid or not, it must be solved by ascertaining what is the statute law or public policy of the state wherein the fire may have occurred. In the case now before the court, if the contract contained in the lease does not violate any of the provisions of the Constitution of the State of Iowa, or is not contrary to any statute of the state, or is not contrary to the public policy of the state as otherwise declared, it cannot be held invalid. * * * The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it *clearly appears* that there is a recognized or established public policy touching the subject-matter which will be violated if the contract is enforced. The burden is upon the plaintiffs in the case of showing that the contract in question is contract to the public policy of the State of Iowa. No express provisions of the constitution or statutes of the state are cited as evidence of the public policy of the state, and the only final decision of the Supreme Court of the state upon the question holds that a contract such as is found in the lease to Simpson, McIntyre & Co., is not

contrary to the public policy of the state. Upon what theory can this court hold that the invalidity of the contract is established? Is this court justified in ignoring the decision of the Supreme Court of Iowa as evidence of the public policy of the state? Clearly not."

(Record, p. 22) 62 Fed. Rep., pp. 906-8.

We quote thus freely from Judge Shiras because of the great clearness and force of his reasoning upon this question. Practically he covers the entire ground, and we have only sought above to present the same line of argument with somewhat greater detail.

In this connection the following decisions of this court bear upon the question under discussion.

In *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555, a statute of Massachusetts forbade traveling on Sunday except for necessity or charity, under penalty of a fine. Plaintiff was injured while riding upon the railway in violation of this statute. State cases had held that there could be no recovery for personal injuries received under such cirsumstances, and this court, MILLER, J., followed such decisions as establishing the local law of Massachusetts on that subject, although not agreeing with their reasoning or conclusion, saying:

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property, as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the Federal courts."

In *Etheredge* v. *Sperry*, 139 U. S., 266, this court also held that Iowa decisions holding chattel mortgages to be valid in that state, which expressly provided that the mortgagor should remain in possession and sell the mort-

gaged property in the usual course of trade, established a rule of property or local law, and would be followed by Federal courts. BREWER, J.:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily at least, a matter of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

See, also:

Chicago Bank v. *Kansas City Bank*, 136 U. S., 235.

Brown v. *Furniture Co.*, 7 Cir. Ct. App., 225.

Swann v. *Swann*, 21 Fed, Rep., 299.

Counsel for plaintiffs in error make some point of the fact that the first decision of the Supreme Court of Iowa in the Griswold case holding the exemption void, was made before the fire which destroyed the warehouse of Simpson, McIntire & Co. The dates are as follows:

1. The Simpson, McIntire lease with the defendant company was made February 1, 1890.

2. The Griswold fire occurred April 30, 1890.

3. The first Griswold decision was made by the Supreme Court of Iowa October 19, 1892, but was not officially published until after the Simpson, McIntire fire. A petition for rehearing was immediately filed, and

4. February 3, 1894, the final decision of the Supreme Court in the Griswold case was made, holding that the exemption in the contract was valid.

5. The fire which destroyed the Simpson, McIntire warehouse occurred November 11, 1892, while the motion for rehearing in the Griswold case was pending.

It will thus be seen that when the lease of Simpson, McIntire & Co. was executed in February, 1890, there had been no ruling or decision by the Supreme Court of Iowa on the question of the validity of the exemption of the lease. It cannot therefore be maintained that Simpson, McIntire & Co. were induced to execute the lease in reliance upon any decisions of the Court of Iowa that its conditions were invalid and void.

Opinion of Judge Shiras, Rec., p. 24.

As stated by Judge Shiras:

"The final decision in the Griswold case shows that on the 30th day of April, 1890, more than two years before the fire happened in this case, the public policy of the state was not adverse to the validity of the exemption from liabilities such as are contracted for in the lease of Simpson, McIntire & Co." Record p. 24.

It appears, therefore, that the final decision of the Supreme Court of Iowa in the Griswold case determines what is the public policy of the state, and what it was when the contract in this case was made. It is a singular instance of illogical reasoning for plaintiffs in error insist that the final decision of the Supreme Court of Iowa in the Griswold case is not binding upon the Federal courts, but that the first decision which was afterwards changed on rehearing, is binding. They say, on page 49 of their brief:

"At this time (November 11, 1892), the plaintiff in-

surance companies were authorized to rely upon the decision above stated, and to believe that if a fire occurred through the negligence of the railway company, it would be liable over to them for any insurance they were required to pay upon the warehouse and its contents, notwithstanding the provision in the lease attempting to exempt the railway company from liability for such fire."

But it cannot be possible that the first decision of the court, followed immediately by a petition for a rehearing, can establish rights or liabilities against the conclusion finally reached. The first decision does not appear in the official reports of the state of Iowa, but was published only in the Northwestern Reporter. But beyond all this, the insurance companies who are plaintiffs here do not for one moment claim or show that they ever did anything in reliance upon the first decision of the Supreme Court in the Griswold case, or that their position had in any sense been changed by reason of that decision.

See Equitable v. Pacific, 108 U. S., 143, and the discussion of this part of the case in the opinion of Judge Shiras, Rec., 24.

II.

Having shown that the question involved is purely one of the public policy of Iowa, and that the Supreme Court of that state has determined it, we might well submit the case without further argument. But counsel for plaintiffs in error attack the decision of the Supreme Court of Iowa and insist that it is bad law. The Circuit Court of Appeals declare that it is good law and follow it, not because it is binding upon Federal courts but because it is a sound and correct exposition of the doctrine of public

policy. The record contains two very able arguments leading to the same result. First, that of Judge Shiras, showing the binding authority of the decision rendered by the Supreme Court of Iowa, and secondly, that of Judge Sanborn, discussing the question as an original one.

We now draw the attention of the court to our second proposition, namely:

Even if the Supreme Court of Iowa had not passed upon the question, the Circuit Court of Appeals was clearly right in deciding, as a general proposition, that the exemption contained in the lease is not contrary to public policy and is, therefore, valid.

Before this lease was made the lessor and the lessees stood upon an equal footing. Neither owed any duty to the other in respect to the land demised by the lessee; certainly the lessees had no right to demand that a site for their building should be carved out of defendant's right of way. The lease established a certain relation between the parties; not the relation of a common carrier to its shippers, but the relation of landlord and tenant. The fact that the railway company owed a duty to the public in respect to other matters has not the slightest relevancy in a discussion of the relation which the parties bear to each other under this lease. The lessees did not come to the railway company demanding a right, but they came requesting a privilege. Without the permission of the railway company they could not enter upon the right of way, nor could they erect their warehouse or carry on the business for which it was erected.

Judge Sanborn, in the opinion of the Court of Appeals, pointed out with great clearness that the contract does not assume to relieve the railway company from any of its public duties, but the only effect of the stipulation

of exemption from liability for negligence is "to prevent the assumption by the railroad company of a new duty which it was entirely free to assume or to refuse to assume." (Rec., 43.)

We do not think the utmost industry of counsel will enable them to find a single case holding that such an exemption as was contained in the lease to Simpson, McIntire & Co., is invalid or in any sense contrary to public policy either in Iowa or elsewhere. The Supreme Court of California, only about a month before the Court of Appeals decided this case, had precisely the same question before them, and in a very strong opinion they held that such an exemption is valid, and demonstrated it by a course of reasoning which seems perfectly conclusive and unanswerable. It is the case of *Stephens et al.* v. *Southern Pacific Company*, 109 Cal., 84. We shall quote somewhat largely from the opinion, because it enforces, with great ability, the reasoning of Judge Sanborn in his opinion. In the California case, the plaintiff, Stephens, was the owner of a certain warehouse situated upon land adjoining the defendant's depot grounds in the Town of Hanford, California. Stephens held the land under a lease from the railway company, one of the covenants of which was as follows:

"And it is further agreed that the said party of the first part shall not be responsible for any damage caused by fire whether from railroad engines or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk or damage, from whatever source, shall be alone sustained by the said party of the second part."

The warehouse was destroyed by fire alleged to have been negligently kindled by the railway company's employes upon adjoining land for the purpose of burning the dry

grass, rubbish, etc., thereon. Stephens was carrying insurance at the time of the fire, and the insurance companies paid the loss and joined with Stephens as plaintiffs. The suit was prosecuted as this suit has been, under the assumption that the exemption contained in the lease was against public policy, and therefore void.

We quote from the opinion of the court by GAROUTTE, J. He says:

"The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers towards parties with whom they deal, and towards the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties when contracting, stood upon common ground, and dealt with each other as A and B might deal with each other with reference to any private business undertaking. It follows that all these principles of law denying or restricting the rights of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparrant when we consider that but a single case has been found directly in point, although it is evident from the argument that counsel upon both sides have very industriously sought for precedents. This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the

general conduct of its business, though its employes, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard: and, unless it is entirely plain that a contract is violative of sound public policy, the court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' *Richmond* v. *Ry. Co.*, 26 Iowa, 191: 'Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical.' *Kellogg* v. *Larkin*, 3 Pin., 125: 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.' *Swann* v. *Swann*, 21 Fed. Rep., 299."

Continuing the discussion of the questions involved in the case, Justice Garoutte took up the various arguments which had been made in behalf of the plaintiffs—the same that have been made here—and showed them to be utterly fallacious and unsound. The supposed tendency of such contracts to encourage negligence and to make people less careful in the conduct of their business, was shown to be somewhat imaginary, and in addition it was pointed out that a great variety of contracts which are universally admitted to be valid, have the same tendency. Such are all forms of insurance contracts, and policies of indemnity against loss for the negligence and dishonesty of employes which are now a very common form of contract, and by which railway companies, banks and mercantile companies protect themselves.

It does not appear in this record, and certainly it cannot be presumed, that the lease in question contemplated any relations whatever between the railway company as lessor, and Simpson, McIntyre & Co. as lessees, by which any of the public duties or obligations of a common carrier were to arise or be performed by this defendant. There is absolutely nothing in the record to warrant such a claim, and we cannot insist too strongly upon this fact. It constitutes a vital point upon which the case must turn. The mere fact that this railway company sustained a *quasi-public* relation as a common carrier of freight and passengers, did not preclude it from leasing portions of its right way, not needed for its public business, to private enterprises like warehouses, etc., upon such terms and conditions as might be mutually agreed upon between the parties. The sole right to acquire, hold and enjoy this right-of-way was derived from the authority of the State

of Iowa. It is unquestioned that the state could regulate the *use* to which such right-of-way might lawfully be devoted by the railway company. It could authorize or forbid the making of such a lease. It could impose the terms and restrictions under which it might be made. No statute of that state has forbidden this lease, and in the absence of legislative prohibition the Supreme Court of Iowa has held, in the Griswold case, that the lease was authorized by law and not opposed to the public policy of the state. This decision conclusively established the legal right of this company to make the Simpson-McIntyre lease, upon the terms and conditions therein agreed to.

A recent decision of this court is directly in point, and decisive of the underlying principle upon which this case rests. In *Missouri Pacific Railway Company* v. *State of Nebraska*, decided in 1896, and reported in 164 U. S., 403, it appeared that certain grain raisers and shippers applied to the railway company for permission to occupy a portion of its depot grounds at Elwood, Nebraska, for the purpose of erecting an elevator for the storage of grain by themselves and others. The company refused, and they appealed to the State Roard of Transportation for an order granting them that privilege. At the hearing it was found that the terminal facilities of the railway company at that station were inadequate, at certain seasons, to accommodate the public in the receipt and storing of grain for shipment; that the railway company had previously granted to two other parties the right to occupy portions of its depot grounds with private elevators, and had refused like privileges to petitioners. That board, acting under supposed authority of the statute, entered an order requiring the railway company to grant to petitioners the same elevator privileges that it had previously granted

to others. Upon the refusal to comply, the Supreme Court of Nebraska issued a writ of mandamus enforcing the order of the commission. The railway company appealed to this court, where it was held that the right of way was its *private property*, held for the public use; that it could not be compelled to lease portions thereof to others, and that to compel such occupancy against its will would amount to a taking of private property without due process of law. This court, speaking through Mr. Justice GRAY, said:

"A railroad corporation doubtless holds its station grounds, tracks and right of way *as its private property*, but for the public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a full and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad* v. *Richardson*, 91 U. S., 454. But how far the railroad company can be *compelled* to do so, against its will, is a wholly different question. * * * The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way" * * * "To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, *to transfer an estate in part of the land which it owns and holds* under its charter as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit without reserving any control of the use of such land or of the building to be erected thereon, to the railroad company for the accommodation of its own business or for the convenience of the public.

"This court, confining itself to what is necessary for the decision of the case before it, *is unanimously of opinion* that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, *was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners.* The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth article of amendment of the Constitution of the United States."

Mo. Pac. Ry. v. *Nebraska*, 164 U. S., pp., 414-417.

This decision establishes a sure foundation upon which our argument may safely rest, and it is directly opposed to the contention of plaintiffs in error. Counsel seem to have overlooked the case. In this Nebraska suit it could have been urged with far greater force than in the case at bar (and undoubtedly was urged), that the furnishing of elevators for storage of grain preparatory to shipment, was an essential and necessary part of adequate station facilities by the railway company; that grain cannot be, and, ordinarily, is not received for carriage at freight depots, but necessarily requires elevators into which it can be delivered by shippers, and from which it can be conveniently loaded upon cars for shipment; that the station facilities afforded by the railway company, through itself or others, were confessedly inadequate to meet the requirements at that station; that as the company held itself out to the public as a common carrier of grains, it was an essential part of its duty to furnish such elevators or permit others to do so, upon its grounds; and that it could not refuse without neglecting an obligation imposed upon it by

public law and policy. It could have beeen further argued, with much greater weight than in the case at bar (and undoubtedly was argued), that petitioners desired such facilities as intending shippers of grain, and were invoking a public duty toward them as such shippers, yet this court evidently did not regard the contention as well founded and did not refer to it, as modifying in the least the respective duties and obligations of the parties. Every argument advanced by counsel for plaintiffs in error, here, could have been urged by the petitioners and the state, in that case, with much more plausibility. The opinion in the Nebraska case completely answers the reasoning of plaintiff's brief in the present appeal. Perhaps that is why they so studiously ignore it.

The Simpson, McIntyre Company lease did not concern or affect any public duties which this railway company, in its other and separate capacity as common carrier might be subject to, under the law of the land. It must be conclusively presumed that the company possessed adequate and ample station facilities at Monticello, Iowa, for the proper storage and handling of all products delivered or tendered to it for transportation over its railway, or waiting delivery after carriage. So far as this record discloses, it was both able and willing to perform, in a prompt and efficient manner, every duty which it owed to the public at large, or to any individual member thereof, in respect to station facilities as a common carrier of butter and eggs. There can be no pretense that this service was inadequate or these accommodations insufficient, in this respect. Simpson, McIntire & Co. made no complaint. The record does not show that they ever shipped, received, or offered to ship or receive, any

of this butter, or these eggs, over the defendant's line of railway, or that they ever contemplated such shipments in the future. It does show, however, that as dealers in those products they rented vacant ground of the company, adjoining its tracks, "*for the purpose of erecting and maintaining thereon a cold storage warehouse.*" Their business was that of purchasing butter and eggs, and storing them until such time as they should desire to ship or sell. How long that would be they alone knew.

They might retail to country dealers or sell at wholesale. In either event they might or might not desire to ship over this railway. It is possibly true that the lessor expected, and these lessees contemplated future shipments from this warehouse, when the winter season or higher markets should make it profitable to ship to distant markets; and probably the expected benefits arising from carriage of such products at some future time, may have been one of the inducing business motives to this railway company to make this lease at a merely nominal rental; just as railway companies, everywhere, encourage business enterprises near their lines, with a view to expected benefits by increase of shipments; but this contract itself concerned no public duty of the railway company, and its conditions violated no existing obligations of a common carrier.

These considerations were clearly and ably set forth in the learned opinion of Judge Shiras at the Circuit, and of Judge Sanborn in the Court of Appeals. They carefully pointed out the fact that none of these products had been delivered to the railway company, or were waiting carriage, or were in its control as a public carrier. In view of the plain record in this respect, unquestioned and unquestionable, we are utterly at a loss to understand

why counsel for plaintiffs in error persist in mistating the undisputed facts in the record and the real question at issue. Their whole argument rests upon an unwarranted assumption of fact. The premises failing, their conclusion is unsound.

They also cite and rely strongly upon the decision of this court in *Covington Stock Yards* v. *Keith*, 139 U. S., 128. The doctrine of that case is not questioned by us, but its applicability is squarely denied. It holds, in substance, that suitable and sufficient station facilities, such as freight depots, stock yards, etc., are necessary to a proper and efficient performance of the public duties of a common carrier in the receipt, carriage, and delivery of freight; that such facilities must be adapted to the peculiar character of the freight offered and received for shipment; and that a railway company may not neglect to provide such accomodations for itself, and exact a special charge therefor if furnished by others. There can be no serious question that this rule would apply with full force to this defendant company, in the conduct of its business *as a common carrier*, but in the case at bar it did not act or contract in any such relation. It owed no such duty to Simpson, McIntire & Co. They claimed no public right from the company, but dealt with it confessedly upon the assumption that they were seeking special privileges as lessees not open to the general public. The fallacy of counsel's whole argument on this point, lies in the fact that it fails, or refuses to distinguish between the public duties and the private rights of a railway company. These are distinct, and cannot be confused in this case.

Counsel for plaintiffs in error strenuously contend that all contracts which seek to relieve one party from legal

liability for its own negligence or that of its servants, are contrary to public policy and void. But this proposition is entirely too broad. There are many decisions of eminent courts holding that such exemptions are not unlawful, but may be contracted for in a proper case. The express messenger cases are striking examples of this class of decisions.

In two leading Massachusetts cases it appeared that express messengers, holding season tickets over the railroad and desiring to ride in the baggage cars, for their own business purposes, expressly contracted to assume all risk of injury while there, and to hold the railway company harmless therefrom. The trains were derailed through negligence and the messengers received injuries thereby. In the first case, it appeared that plaintiff's presence in the baggage car directly contributed to his injuries, and in the latter case it did not. In each of these suits it was held that the contract for immunity was valid and would be enforced. The court said:

"It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that in consideratton that the defendant would permit him to ride in the baggage car he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. The question of the right of carriers to limit their liability for negligence in the discharge of their duty as car-

riers by contracts with their customers or passengers in regard to such duties does not arise under this contract as construed in this case."

Bates v. *Old Col. R. R. Co.*, 147 Mass., pp. 265–6.

In the second case it was said:

"The contract gave the plaintiff a privilege which he sought for his own convenience. That it was a valid contract cannot be questioned since the decision in *Bates* v. *Old Colony Railroad.*"

Hosmer v. *Old Col. R. R. Co.*, 156 Mass., 507.

The same conclusion was reached by the Supreme Court of Indiana in 1896, in an elaborate opinion reviewing the authorities. The case was similar, in all material facts, to the Massachusetts cases. The court affirmed the doctrine that a railway company cannot, by special contract, exempt itself from liability for the results of its negligence, or that of its servants, *while performing a duty which it owes to the public as a common carrier*, but held that it was not a duty of the railroad company, as common carrier, to transport the goods of an express company and the messengers in charge of them, and that where it undertakes by special engagement to do so, it thereby becomes a private carrier, or bailee for hire, as to the person or things so carried, and may lawfully protect itself by contract from the results of its own negligence in respect thereto.

L., N. A. & C. Ry. Co. v. *Keefer*, (Ind.) 44 N. E. Rep., 796.

The principle upon which these decisions rest, has found recognition by this court in the Express Cases, 117

U. S., 1. Certain railroad companies had undertaken to perform for the public the express business previously done over their lines by independent express companies. The latter applied for space in the express cars for their goods and messengers, but the railroad companies refused to grant such accommodations or to carry the messengers, and suit was brought to compel them to furnish the desired facilities. This court, however, held that railways were under no legal obligation to carry the goods and messengers of express companies, in the manner in which that traffic was usually handled; that in rendering such service, the railway would not be performing any duty which it owed to the public *as a common carrier*; and that the desired privileges could only be obtained by express contract between the parties, upon such terms as might be agreed upon.

The doctrine is further illustrated by what is commonly known as the "circus-train cases." In 1892 the present defendant company entered into a special contract to haul a circus train over its road, between certain points, on different days, and at rates below its regular tariff for carriage of passengers and freight. In consideration of the reduced rate and increased risk, it was expressly stipulated that the railway company should not be liable for injury, "from any cause," to the persons or property transported under such contract. A train was derailed, and part of the circus property destroyed through negligence of the railway company in respect to the condition of its track and the operation of its train. In an action to recover for such loss, the Circuit Court of Appeals for the Seventh circuit, held that the contract was valid and enforcible, basing their decision upon the broad ground that the railway company was under no legal obligation

to transport circus trains in the manner stipulated for, but that it contracted as a private and not as a public carrier in that respect, and therefore could lawfully secure indemnity against the results of its own negligence in respect to the subject-matter of the agreement.

C., M. & St. P. Ry. Co. v. *Wallace*, 14 Cir. Ct. App. Rep., 257; s. c., 66 Fed. Rep., 506.

This decision is directly sustained by the following authorities, which reach the same conclusion from similar states of fact.

Coup v. *Ry. Co.*, 56 Mich., 111.

Robertson v. *Ry. Co.*, 156 Mass., 525.

Forepaugh v. *Ry. Co.*, 128 Pa. St., 217.

Piedmont Mfg. Co. v. *R. R. Co.*, 19 S. Car., 353.

"A common carrier may undoubtedly become a private carrier, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

Bradley, J., *in R. R. Co.* v. *Lockwood*, 17 Wall., p. 377.

Liverpool Co. v. *Ins. Co.*, 129 U. S., 440.

Hutchinson on Carriers, 2nd Ed., Secs. 44 & 73.

"The private carrier may by contract with his employer, exonerate himself from liability on account of his inattention or want of diligence or skill in the execution of the trust. *He may stipulate that he shall in no event be liable, except for fraud or its equivalent.*"

Hutchinson on Carriers, 2nd Ed., Sec. 40,

Wells v. *Steam Nav. Co.*, 2 Comstock, 204.

Alexander v. *Green*, 3 Hill., 9.

The underlying principle of all these cases is that common carriers become private carriers when, by special contract, they undertake to transport property which it is not their regular business to carry; or to transport it in a different manner or by other methods from the usual and established ones. As public carriers, obliged to serve all equally within the range of their employment, railway companies are forbidden by the common law to exact unreasonable or oppressive terms and immunities, but the private carrier or bailee for hire is free to impose what condition he will. If agreed to, it is a mere matter of private contract in which the public are not concerned and in which no public policy is violated.

Now, if a railway company can refuse to furnish facilities and transport messengers for independent express companies, and can lawfully contract as a private and not as a public carrier to transport express messengers or circus trains, upon what legal basis or sound reasoning can it be successfully contended that the same company cannot, as a private owner, lease portions of its own right of way to a private partnership for business use, upon like terms of immunity and exemption from the results of negligence on the part of servants whose conduct it cannot always supervise or control. Does the railway company contract in the latter case, in its capacity as a public or common carrier, any more than it did in the express-messenger and circus-train cases? Have the public any greater interest in the latter contract than in the former agreements? Is the public policy of the state, or of the nation, violated in the latter case and not in the former? We submit that the doctrine of the foregoing decisions is decisive of the rule for which we contend. It is impossible to deny the validity of the exemption pleaded in this case, without overruling the decision of this court in the

express cases, and overturning the doctrine of the Massachusetts, Michigan, Pennsylvania, South Carolina and other courts upon the same question.

Another striking illustration of the doctrine is found in ordinary contracts of insurance. For example, take the very policies issued by plaintiffs in error upon this warehouse and contents: Although not expressly so worded, yet it is settled law that they actually indemnified and insured Simpson, McIntire & Co., against loss or damage to their property, occuring through any negligence of the owners themselves, or of their servants or agents. In these policies, the insurance companies went still further and voluntarily contracted with Simpson, McIntire & Co. to assume and carry the very same risk of loss by fire negligently set in the operation of defendant's railway which that firm had previously agreed, in their lease with the railway company, to assume and carry for themselves. In other words, plaintiffs in error insured Simpson, McIntire & Co. against the very risk that such lessees had previously indemnified their lessor against. In effect, *a re-insurance.*

This court has repeatedly held that insurance contracts were not unlawful or opposed to public policy, which directly indemnified common carriers against loss by fire occurring through their own negligence or that of their servants, to property in their possession as public carriers for transportation. It was said:

"No rule of law, or of public policy, is violated by allowing a common carrier, like any other person having either the general property or the peculiar interest in the goods, to have them insured against the usual perils, and to recover for any loss in such perils, *though occasioned by the negligence of his own servant.*"

GRAY, J., in *Phoenix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S., 324.

In that case it was further said that:

"As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate that the owner be allowed the benefit of insurance voluntarily obtained by the latter." (p. 325.)

And in a later case, when asked to review the holding above quoted, this court said:

"Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine announced in the case cited (*Phoenix Ins. Co.* v. *Erie Trans. Co.*, 117 U. S., 312), has been referred to with approval in the subsequent cases of *Orient Ins. Co.* v. *Adams*, 123 U. S., 67, 72, and *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S., 397,438."

Cal. Ins. Co. v. *Union Compress Co.*, 133 U. S., p. 415.

Where an insurable interest in property exists, insurance against loss by negligence of the owner or his servants is valid and will be sustained by the courts.

Ins. Co. v. *Coulter*, 3 Peters, 222.
Ins. Co. v. *Lawrence*, 10 Peters, 507.
Walters v. *Ins. Co.*, 11 Peters, 213.
Ins. Co. v. *Ins. Co.*, 5 Ch. Div., 584.
Shaw v. *Roberts*, 6 A. & E., 80.
Johnson v. *Ins. Co.*, 4 Allen, 388.

In *Shaw* v. *Roberts*, 6 Ad. & El., 80 (33 E. C. L. R.), Lord DENMAN said:

"There is no doubt that one of the objects of insurance against fire is to guard against the negligence of servants and others, and, therefore, the simple fact of negligence has never been held to constitute a defense. But it is argued that there is a distinction between the negligence of servants or strangers and that of the

assured himself. We do not see any ground for such a distinction."

The same is true of all contracts or policies of life, accident and indemnity insurance. They rest upon the same basis, and are controlled by the same principles. Negligence of the assured, or of the beneficiary, will not defeat recovery.

It could be argued with much greater force than in the case at bar, that these contracts of insurance would necessarily tend to diminish the care of the owner in respect to the property insured, and also the property of the public which might be indirectly affected thereby. The same argument would also apply to the express cases and circustrain cases cited above, yet it is evident that this argument has never been held to constitute a sufficient objection to such contracts, to require them to be held illegal and void as opposed to public policy. All these agreements, and many others which might be mentioned, would be invalidated if the contention of plaintiffs in this case is sound law, but upon the contrary, such contracts have been everywhere upheld by courts as being consistent with sound public policy. This has been pointed out with great force and clearness by the Supreme Court of California in *Stephens* v. *So. Pac. Co.*, *supra*. That decision is directly in point. It is not correct to say that the necessary effect of these contracts is to lessen the care which either party owes to the general public. The parties have simply agreed among themselves that their obligations *towards each other* shall be regulated by mutual contract, leaving the respective duties and obligations of each to the general public, as they were before. The contracting parties have separated themselves from the general public, and have entered into

new and different duties and obligations among themselves, but have not sought to diminish or destroy any right of the general public or to impair any obligation upon their part to that public. The same reasoning will apply with still greater force to the contract of lease between the parties to this suit. The duty of this railway company towards the general public, and each member thereof, in respect to the prevention of fires set by its negligence or that of its employes, remain precisely the same that it was before this contract was entered into. The measure of care and the incentive to exercise that care, were just as great, *after*, as before the execution of this lease.

In support of their contention that this lease was contrary to public policy and void, counsel for plaintiffs in error strongly rely upon that line of decisions, of which *R. R. Co.* v. *Lockwood*, 17 Wall., 357, and like cases are leading examples, and where this court lay down the rule that common carriers cannot lawfully stipulate with shippers for exemption from the consequences of their own negligence. This court refused to follow decisions of the State of New York upholding such agreements, and the doctrine has since been applied to other contracts of public carriers, both as to passengers and freight. These cases rest upon considerations peculiar to themselves. The stipulations were there made (or exacted) by public carriers *acting in that capacity, and in respect of duties and obligations which they admittedly owed to the public, and in which the state had a direct interest.* It was said that:

"The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his

employment, would never have been entertained by the sages of the law."

R. R. Co. v. *Lockwood*, 17 Wall., p. 381.

But even in that case, the court say: "*If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public.*" (p. 379.)

It is to be observed that in the later case of *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, Mr. Justice GRAY, in analyzing and restating the doctrine of the Lockwood opinion, expressly puts it upon *common law principles.* He says:

"By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servant's negligence." (p. 439.)

This class of cases is not only not in conflict with our position, but sustains it, because the facts are vitally different. The lease and exemption in question were not *exacted* by defendant, or obtained in its capacity *as a common carrier, or in respect of duties obligatory under such relation*, out of an unwilling but helpless patron. They were voluntary transactions between parties acting in the private and independent situation of lessor and lessee, and concerning terms and conditions upon which a leasehold interest in or right to real estate should be created and enjoyed. Simp-

son, McIntire & Co. had absolutely no right whatever to occupy this land without the company's consent. Such consent might be given upon terms which they were free to accept or reject. If voluntarily agreed to, wherein were the general public concerned, or how did the railway company evade its public duties as a common carrier?

It is conceded that *if* such had been its effect, the statute of Iowa (1 McClain's Code, Sec. 2007), would have avoided the lease. But the Supreme Court of that state, in the Griswold case, held that it did not. If this decision is not a construction of state statute which this court should follow, is not its reasoning persuasive and convincing upon the question, considered as one of general law?

The public have a direct interest in the careful performance of these duties which essentially and necessarily inhere in the relation of common or public carrier, and it may well be said to be against public policy to uphold contracts which, in effect, allow the carrier to abdicate or ignore imperative public duties. In this respect the United States have a policy independent of that of each state. The power to regulate interstate commerce (carriage of persons and property) creates and requires a *national policy* in these respects, which should not be controlled by local and frequently conflicting policies or interests of the several states. These, and other considerations, sustain the doctrine of the Lockwood case, and similar decisions, without affecting in the least the rule for which we contend.

In *Hart* v. *Ry. Co.*, 112 U. S., 331, it was held not to be contrary to public policy for a common carrier of goods to stipulate for an agreed lower valuation in the event of loss by its own negligence. This court did not

think that such partial exemption, if fair and reasonable, would tend to lessen the care of the railway company in respect to goods entrusted to it for transportation.

Again: The class of cases which hold that it is contrary to public policy for an employer to exact from the employe, as a condition of employment, release of liability for personal injuries thereafter sustained by negligence of the master or his servants (of which *R. R. Co.* v. *Spangler*, 44 Ohio St., 441, is an example), rests upon peculiar and entirely different considerations. In the first place, it is well said that the state has a direct interest in the lives of its citizens. The welfare and prosperity of the public are concerned in the preservation of the lives and limbs of its members. A mutilated man is a burden, and a dead man a loss to society. The life and service of each individual are of value to the state. Intentionally or negligently to deprive it of either, is forbidden by positive law and public policy. Another reason is found in the *disparity* between the contracting parties. They do not stand upon the same footing or contract with equal freedom. The working man must labor, the capitalist is not compelled to hire. Such contest is unequal, and the weaker party is practically forced to barter away rights in which the public are interested. It was this very thought of inequality and subjection which largely influenced this court in the Lockwood and similar decisions, when it was said:

"*The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice, etc.*"

Gray, J., in *Liverpool Steam Co.* v. *Ins. Co.*, 129 U. S., 441.

Bradley, J., in *R. R. Co.* v. *Lockwood*, 17 Wall., 379.

But these forceful reasons have no application to contracts of indemnity against negligence, where mere *property* unaffected by public interest is concerned; where the parties stand upon a perfect equality, and where one seeks the use of another's land for business purposes. We submit that no well considered case invalidates a contract like the one at bar.

But counsel for plaintiffs in error further contend that aside from its obligations as a common carrier, this railway company owed to the public, and to Simpson, McIntire & Co., in particular, a separate and additional duty of ordinary care not to destroy their property by fires negligently set in the operation of its road, which duty it could not abdicate or evade by any contract. In this inquiry it is of the utmost importance clearly to ascertain the actual situation of the parties to this lease, and the respective duties and obligations of each, before as well as after making this lease.

We concede that the railway company could not, under guise of this contract, relieve itself from any obligations which positive law or public policy imposed for the general welfare, but we assert that these public duties were not affected, or intended to be changed by the lease in question. They remained precisely the same after this contract as before. To those who occupy land adjoining their right of way, or who do business upon adjacent premises, railway companies owe a duty of ordinary watchfulness and care to prevent loss or damage by the escape of fire in the operation of its trains. Each party being in the independent exercise of a legal right, not derived from the other, both must use reasonable care to avoid injury to the other. This upon the familiar principle that one must so use his own as not negligently

to injure the property of another. But if the same parties come themselves, or store their property upon the private right of way of the railway company, without its permission, they thereby become *trespassers in law*, and the railway company is not, thereby, charged with any active duty of care for the protection of such persons or property, but are liable only for willful or wanton injury, or negligence so gross as to evince wantonness or willfulness. Numerous decisions of courts, state and Federal, have settled this rule of law which is equally applicable to persons or property.

Before the execution of this lease, Simpson, McIntire & Co. had no legal rights whatever upon defendant's station grounds. They could not place their buildings or store their property thereon without being trespassers, and incurring all the risks resulting from such trespass. Being there as trespassers or as mere licensees, no active duty of watchfulness and care towards them or their property would be imposed upon the railway company in the operation of its engines and trains, but only a mere negative obligation of abstaining from willful or wanton injury. They could not compel the railway company, against its will, to lease to them any part of its right of way or to permit them to erect buildings or store property thereon.

Mo. Pac. Ry. Co. v. *Nebraska*, 164 U. S., 403.

For their own private benefit and advantage, Simpson, McIntire & Co. sought to secure privileges which the law did not give them, and which they could acquire only by express consent of, and special contract with, the owner of the land. They, therefore, applied for a lease of

ground upon which to erect and maintain a cold storage warehouse, in close proximity to railway tracks in constant use, wherein were to be stored butter, eggs and other perishable products. If such permission should be granted, without restriction, a new, continuing and possibly onerous obligation would thereby be imposed upon the railway company, namely, the duty of exercising reasonable watchfulness and care to prevent the burning of this building and contents by fire set through negligence of its servants conducting its business, but whose conduct it could not always supervise or control. This new duty did not concern defendant's ordinary business as a common carrier, nor was it a burden which it held itself out to the general public that it would undertake for all who desired to locate upon its right of way. Upon the contrary, it was a duty created and existing wholly by mutual agreement, and therefore to be measured by the terms of the contract itself.

The railway company, therefore, announced, in effect, that it would not consent to assume or carry this additional, and onerous risk, not obligatory upon or beneficial to it, but as a matter of favor would grant the desired privileges at a merely nominal rent, *provided and upon the express condition only*, that the lessees should assume and carry such risk themselves, and relieve the railway company therefrom. This proposition was voluntarily accepted by Simpson, McIntire & Co. They acquired the desired rights upon the condition of imposing no additional obligation of duty upon the lessor. Both parties stood upon an equal footing, and understood and mutually agreed upon such terms, by executing the lease in question. The lessees occupied under it for the full term and longer, and having received the benefits,

now refuse to repudiate the burdens of this agreement. They *disclaim of record* any right to recover for the balance of their loss beyond the insurance received, but the insurance companies who were paid to assume this very risk come into court and attack the contract under which the insured building was erected.

Freedom of Contract. The right of people to judge for themselves what contracts they shall make, provided they are not clearly immoral or detrimental to the public interest, is universally recognized by the courts; and political writers have shown how important it is to the well-being of a nation or a community that every citizen should be at liberty to work out his own destiny and to enter into such contractual relations as to him shall seem best, subject only to the limitation that his acts must not be subversive of the public welfare. The power of courts to declare what is the public policy and to declare that a contract is void as against public policy, is one of great responsibility and great delicacy. Courts do not strike down contracts which have been freely entered into except for the most cogent reasons. It is like the power to declare statutes unconstitutional, a power which is never exercised in doubtful cases.

In *Printing & Num. Reg. Co.* v. *Sampson*, The Law Reports, 19 Equity, 465, Sir George Jessel, Master of the Rolls, used this pregnant language:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract."

The Supreme Court of Iowa in *Griswold* v. *Illinois Central R. R. Co.*, *supra*, the case upon which Judge Shiras relied, adopts and approves the above language of Sir George Jessel, and the same court in *Richmond* v. *Railroad Company*, 26 Iowa, 202, said:

"The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

In the California case which we have cited, *Stephens* v. *Southern Pacific Co.*, *supra*, that court said:

"While contracts opposed to morality or law should not be allowed to show themselves in courts of jurtice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard, and unless it is entirely plain the contract is violative of sound public policy, the court wsll never so declare."

In *Swann* v. *Swann*, 21 Fed. Rep., 299, Judge CALDWELL declared the law as follows:

"The contract in suit was voluntarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people."

Here we have a contract made in Iowa, with all of its terms and provisions to be executed in Iowa, a contract

which has been attacked on the ground that it is violative of the public policy of Iowa. The Supreme Court of that state, after a full and elaborate discussion of every question, and after argument of a motion for a re-hearing, held the contract to be valid. Now, if the decision of the Supreme Court of Iowa upon this question is not controlling and binding upon the Federal courts it is, to say the least, in the language of Judge SANBORN, "entitled to the weight of persuasive authority." If this court is bound by the perfectly well-established doctrine that it will not refuse its aid in the enforcement of contracts unless their illegality is clearly shown, can it for a moment be urged that the contract in question is so clearly against public policy as to be free from doubt? If this court is not bound by the decision of the Supreme Court of Iowa, can it be said that that court, by its solemn decision of what is the public policy of that state, has not succeeded in raising a doubt or hesitation in the judicial mind of the Federal courts upon the question? Instead of that being the present situation, we have here to-day:

First. The decision of the Supreme Court of Iowa on the public policy of that state.

Second. The decision of Judge Shiras holding that that decision is binding upon Federal Courts.

Third. The decision of the Circuit Court of Appeals, by Sanborn J., holding that while the decision of the Supreme Court of Iowa is not binding upon them, that the decision was right and that the exemption from liability in the lease was clearly not against public policy, and

Fourth. The dissenting opinion of Judge CALDWELL, holding that the decision of the Supreme Court of Iowa is binding upon the Federal courts, but adding significantly:

"But, however this may be, *there is no difference of opinion between the Supreme Court of Iowa and this court as to the validity of the lease and all its conditions*, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the Supreme Court, *if the two courts differed on the question of public policy.*"

In other words the courts which have had the question before them are unanimous that the contract is a valid one, and not against public policy.

Besides all these adjudications, the Supreme Court of California, in *Stephens* v. *So. Pac. Co.*, *supra*, has, by an independent course of reasoning, reached the same conclusion, and has declared that an exemption from liability for negligence in a lease by a railroad company of lands for warehouse purposes, is not contrary to public policy.

Against all this overwhelming weight of authority and judicial reasoning, not a single case has been decided the other way.

In conclusion, we have only to say that these insurance companies solicited and took the risk upon this warehouse and contents, at a rate based upon the added exposure to fires from passing trains, and now seek to reap where they have not sown, by invoking a supposed public policy to recover for the loss which they received full consideration for assuming. We submit that the claim does not strongly appeal to an enlightened public policy, and that the Circuit Court of Appeals was right in so declaring.

GEORGE R. PECK.
CHARLES B. KEELER,
Counsel for Defendants in Error.

HARTFORD FIRE INSURANCE COMPANY *v.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 5. Argued November 11, 12, 1897. — Decided November 6, 1899.

Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union — when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application — are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court.

A lease to a commercial partnership from a railroad corporation of a strip of its land by the side of its track in the State of Iowa, for the purpose of erecting and maintaining a cold storage warehouse thereon, contained an agreement that the corporation should not be liable to the partnership for any damage to the building or contents, by fire from the locomotive engines of the corporation, although owing to its negligence. At the trial of an action brought in the Circuit Court of the United States by the partnership against the corporation to recover for damage to the building and contents by fire from its locomotive engines, owing to its negligence, under a statute of the State making any railroad corporation liable for damage to property of others by fire from its locomotive engines, the plaintiff contended that the agreement was void as against public policy. It appeared that, since this lease, the highest court of the State, in an action between other parties, had at first held a like agreement to be void as against public policy, but, upon a rehearing, had reversed

its opinion, and entered final judgment affirming the validity of the agreement; and it also appeared that its final decision was not inconsistent with its decision or opinion in any other case. *Held*, that the question of the validity of the agreement was one of statutory and local law, and not of the commercial law, or of general jurisprudence; and that the final decision of the state court thereon was rightly followed by the Circuit Court of the United States.

THE case is stated in the opinion.

Mr. Charles A. Clark and *Mr. Richard W. Barger* for plaintiffs in error and petitioners.

Mr. Charles B. Keeler and *Mr. George R. Peck* for defendants in error and respondents.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought May 10, 1893, in the district court of Jones County in the State of Iowa, against the Chicago, Milwaukee and St. Paul Railway Company, a railroad corporation of Wisconsin, by seven fire insurance companies, corporations of other States, to recover for the loss by fire, owing to the defendant's negligence, of a warehouse and goods, belonging to the partnership of Simpson, McIntire & Company, and insured by the plaintiffs, who had paid the loss.

The petition alleged that on November 11, 1892, and long before, the partnership was doing business at Monticello in that county, and there owned a cold storage warehouse, situated upon railroad ground by the side of the railway track of the defendant in Monticello, and containing a valuable stock of butter and eggs; that on that day the defendant, while running its engines and cars on its railway track alongside of the warehouse, negligently set fire to and destroyed the warehouse and its contents to the value of $27,118; that at the time of the fire the partnership held policies of insurance against fire on this property from each of the plaintiffs, and was afterwards paid by them, under those policies, the aggregate sum of $23,450; and that the plaintiffs thereby

became, to that extent, subrogated to the partnership's right against the defendant, and were entitled to judgment against it for the sum so paid, with interest.

The defendant, on May 23, 1893, removed the case into the Circuit Court of the United States for the District of Iowa, and in that court, on September 12, 1893, filed an answer, admitting that the parties to the action were corporations, and that the partnership was doing business at Monticello, as alleged, but denying all the other allegations of the petition.

On April 2, 1894, by leave of court, an amended answer was filed, alleging that the land on which the warehouse stood belonged to the defendant as part of its depot grounds at Monticello; and that the sole right and occupancy of the partnership therein were by virtue of an indenture of lease, dated February 1, 1890, executed by the defendant and by the partnership, under which the partnership entered into and thenceforth occupied the land, and which was set forth in the answer, and was as follows:

The defendant leased the land, (describing it by metes and bounds, showing it to be a strip, one hundred and thirty feet long and fifty-five feet wide, part of its depot grounds, and by the side of its track,) to the partnership, "to hold for the term of one year from the date hereof, for the purpose of erecting and maintaining thereon a cold storage warehouse, the said lessee yielding and paying therefor the annual rent of five dollars in advance: and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors and administrators and assigns, do hereby expressly release them, from all liability or damage by reason of any injury to or destruction of any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from carelessness or negligence of employés or agents of said railway com-

pany; and further, that the said parties of the second part will in no way obstruct or interfere with the track of said railway company in using said premises.

"And the parties of the second part agree to keep said premises in as good repair and condition as the same are in at the commencement of said term; to pay, as the same become due and payable, all taxes and assessments, general and special, that may be levied or assessed thereon during the time they remain in possession thereof; and to quit and surrender said premises at the expiration of said term, on demand of said railway company; and, in case such demand shall not be made at the expiration of said term, to pay said rent, at the rate and in the instalments aforesaid, as long as they remain in possession thereof; and that they will not underlease said premises without the written consent of said railway company.

"And said parties of the second part further agree to quit and surrender said premises at any time before the expiration of said first-mentioned term, or at any time when default shall be made in the payment of said rent or taxes as aforesaid, within thirty days after demand of said railway company; and that upon the expiration of said thirty days, it shall be lawful for said railway company to expel them therefrom.

"The parties of the second part may (and hereby agree that they will, if said railway company shall so require,) remove from said premises, within thirty days after any termination of this lease, all structures owned or placed thereon by them."

The amended answer concluded by alleging "that from the first day of February, 1890, down to and including the time of said fire, Simpson, McIntire & Company remained in possession and occupancy of said premises under the terms and conditions of said original lease, and not otherwise; and were and continued to be tenants holding over under the lease aforesaid, and subject to all its provisions; and that, as to the alleged destruction by fire of the building and property mentioned in the plaintiffs' petition, all such risks, and the loss therefrom, were assumed by said Simpson, McIntire & Company, and this defendant company was released therefrom, as one of the

express conditions of said lease and occupancy, and plaintiffs cannot now recover therefor. Wherefore the defendant prays judgment herein."

The plaintiffs demurred to the amended answer, on the ground that the stipulation in the lease, by which it was sought to exonerate the defendant from loss by fire caused by the negligence of itself or its servants, was void as against public policy.

At the argument of the demurrer in the Circuit Court of the United States at April term 1894, before Judge Shiras, (as is shown by his opinion copied in the record, and printed in 62 Fed. Rep. 904,) it appeared that a case between other parties, involving the question at issue in this case, was then pending before the Supreme Court of the State of Iowa, under the following circumstances: In that case, entitled *Griswold* v. *Illinois Central Railroad*, that court, on October 19, 1892, (by an opinion reported only in 53 Northwestern Reporter, 295,) had held a similar stipulation to be void as against public policy; but, on February 3, 1894, upon a rehearing, had held to the contrary, and had sustained the validity of the stipulation, two judges dissenting. 90 Iowa, 265. A second petition for rehearing was then filed, and was still pending in that court. Under those circumstances, Judge Shiras suspended action on the demurrer, awaiting the final decision of the Supreme Court of the State. That court afterwards denied the second petition for rehearing, thereby finally affirming the validity of the stipulation; and thereupon Judge Shiras, at September term 1894, overruled the demurrer, and, the plaintiffs declining to plead further, rendered judgment for the defendant.

That judgment was unanimously affirmed by the Circuit Court of Appeals, upon the ground that the stipulation was valid, and was not against public policy; Judges Sanborn and Thayer, however, expressing the opinion (Judge Caldwell nonconcurring in this respect) that the decision of the state court was not conclusive upon this question. 36 U. S. App. 152. The plaintiffs thereupon applied for and obtained this writ of certiorari.

This action against a railroad corporation, for the loss by fire, owing to its negligence in running its engines and trains, of a cold storage warehouse and the goods therein, owned by a commercial partnership, is brought by insurers of the property, who had paid to the partnership the greater part of the loss, and whose right, thereby acquired by way of subrogation, to recover against the railroad company to the extent of the amount so paid, is but the same right that the partnership had. *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312.

It is important, therefore, in the first place, to ascertain exactly what were the relations between the railroad company and the partnership.

The warehouse stood upon a strip of land, belonging to the railroad company, by the side of its track, and part of its depot grounds at Monticello in the State of Iowa. The sole right of the partnership in that strip was by virtue of an indenture of lease thereof, dated February 1, 1890, by which the railroad company leased it to the partnership for a year from that date, "for the purpose of erecting and maintaining thereon a cold storage warehouse," at an annual rent of five dollars payable in advance, "and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released," and the lessees "do hereby expressly release them," from all liability or damage by reason of any destruction or injury of buildings then upon or afterwards placed on the land, or of personal property inside or outside of those buildings, "by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employés or agents of said railway company;" and the lessees covenanted in no way to obstruct or interfere with the track of the railroad company. The rest of the indenture consisted of covenants of the lessees to keep the premises in repair; to pay the rent and taxes so long as they remained in possession; to surrender possession to the lessor, at the expiration of the term, if then demanded, or, before its expiration, or on default in payment of rent or taxes,

within thirty days after demand; and not to underlease without the lessor's consent; with a further agreement that the lessees might, and, if required by the lessor, would, remove from the premises, within thirty days after any termination of the lease, all structures owned or placed thereon by them.

The indenture, in short, is a lease by the railroad company of a strip of its land by the side of its track to the partnership, for the purpose of erecting and maintaining a cold storage warehouse thereon, for one year and for such longer time as the lessee may be permitted by the lessor to remain in possession; and contains no further agreements, other than those usual between lessor and lessee, except a covenant of the lessee not to obstruct or interfere with the railroad track of the lessor; and an express condition of the lease, and covenant of the lessee, that the lessor shall not be liable to the lessee for any damage to the building or to personal property in or about it, by fire from the lessor's locomotive engines, or by trains or cars running off the railroad track, although owing to the negligence of the lessor or its servants.

The indenture contains no stipulation concerning, or even any mention of, any transportation of goods over the railroad, or any relation of the railroad company as a common carrier to the lessee or to the public; and there is nothing in the record to show that such a relation existed between the railroad company and the lessee, or that the warehouse was built or maintained for the benefit of the public, or of the railroad corporation, or of any one but the partnership.

The decision of the case turns upon the question whether the provision of this indenture, by which the railroad company is not to be liable for damage to the property by fire from its locomotive engines, owing to the negligence of itself or its servants, is void as against public policy.

The plaintiffs' counsel at the argument much relied on the cases in which similar provisions in the contracts of common carriers, or of telegraph companies, have been held to be void.

It is settled by the decisions of this court that a provision, in a contract between a railroad corporation and the owner

of goods received by it as a common carrier, that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy, and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the State in which the question arises. But the reasons on which those decisions are founded are, that such a question is one of the general mercantile law; that the liability of a common carrier is created by the common law, and not by contract; that to use due care and diligence in carrying goods intrusted to him is an essential duty of his employment, which he cannot throw off; that a common carrier is under an obligation to the public to carry all goods offered to be carried, within the scope and capacity of the business which he has held himself out to the public as doing; and that, in making special contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 439–442, and other cases there cited. Although a telegraph company is not a common carrier, yet its relation with senders of messages over its lines is of a commercial nature, and contracts that the company shall not be liable for the negligence of its servants, are affected, in some degree, by similar considerations. *Express Co.* v. *Caldwell*, 21 Wall. 264, 269; *Western Union Tel. Co.* v. *Texas*, 105 U. S. 460, 464; *Primrose* v. *Western Union Tel. Co.*, 154 U. S. 1; *Western Union Tel. Co.* v. *Cook*, 15 U. S. App. 445; *Harkness* v. *Western Union Tel. Co.*, 73 Iowa, 190.

The plaintiffs further insisted that the same reasons apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authorities cited which support this proposition are a general statement in Cooley on Torts, 687, and an *obiter dictum* in *Johnson* v. *Richmond & Danville Railroad*, 86 Virginia, 975, 978; and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or of

his servants, or may, by stipulation with the owner of goods carried, have the benefit of such insurance procured thereon by such owner. *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312; *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 414; *Wager* v. *Providence Ins. Co.*, 150 U. S. 99.

A railroad corporation holds its station grounds, railroad tracks and right of way, for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others, in the manner which it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. *Covington Stockyards* v. *Keith*, 139 U. S. 128. But it is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures, for their own benefit, upon the land of the railroad company. *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403.

In the case at bar, no one had the right to put a warehouse or other building upon the land of the railroad corporation without its consent; and the corporation was under no obligation to the public, or to the partnership, to permit the latter to do so. In granting and receiving the license from the corporation to the partnership to place and maintain a cold storage warehouse upon a strip of such land by the side of the railroad track, and in erecting the warehouse thereon, both parties knew that its proximity to the track must increase the risk of damages, whether by accident or by negligence, to the warehouse and its contents, by fire set by sparks from the locomotive engines, or by trains or cars running off the track. The principal consideration, expressed in their contract, for the license to build and maintain the warehouse on this strip

of land, was the stipulation exempting the railroad company from liability to the licensee for any such damages. And the public had no interest in the question which of the parties to the contract should be ultimately responsible for such damages to property placed on the land of the corporation by its consent only.

The case is wholly different from those, cited by the plaintiffs, in which a lease by a railroad corporation, transferring its entire property and franchises to another corporation, and thus undertaking to disable itself from performing all the duties to the public imposed upon it by its charter, has been held to be *ultra vires*, and therefore void — as in *Thomas* v. *Railroad Co.*, 101 U. S. 71, and in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, and 171 U. S. 138.

Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union — when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application — are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 594; *Vidal* v. *Girard*, 2 How. 127, 197; *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 581, 584; *Detroit* v. *Osborne*, 135 U. S. 492, 498, 499; *Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 235; *Etheridge* v. *Sperry*, 139 U. S. 266, 276, 277; *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349, 357; *Bamberger* v. *Schoolfield*, 160 U. S. 149, 159; *Missouri &c. Trust Co.* v. *Krumseig*, 172 U. S. 351; *Sioux City Railroad* v. *Trust Co. of North America*, 173 U. S. 99.

The validity of the agreement now in controversy does not depend upon the Constitution, laws or treaties of the United States, or upon any principle of the commercial or mercantile law, or of general jurisprudence.

Generally speaking, the right of a railroad corporation to build its road, and to run its locomotive engines and cars thereon, within any State, is derived from the legislature of

the State; and it is within the undisputed powers of that legislature to prescribe the precautions that the corporation shall take to guard against injuries to the property of others by the running of its trains; as well as the measure of its liability in case such injuries happen. Among the most familiar instances of the exercise of this power are statutes requiring a railroad corporation to erect fences between its road and adjoining lands, and subjecting it to either single or double damages for any injury to cattle or other animals caused by its neglect to do so; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Same* v. *Emmons*, 149 U. S. 364; and statutes making a railroad corporation liable, for damages to property of others from fire set by sparks from its locomotive engines, either independently of negligence on its part, or in case of such negligence only. *St. Louis & San Francisco Railway* v. *Matthews*, 165 U. S. 1; *Atchison &c. Railroad* v. *Matthews*, 174 U. S. 96.

As was well said by the Circuit Court, in the case at bar, in a passage quoted by this court in *St. Louis & San Francisco Railway* v. *Matthews*, just cited: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the State; and it certainly cannot be denied that it is for the State to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operations of trains by means of steam locomotives. This is a matter within state control. The legislation of the State determines the width of the right of way used by the companies. The State may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick or other like material, when built in cities, or in close proximity to other buildings. The State, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads." 62 Fed. Rep. 907; 165 U. S. 17.

The statutes and decisions of the State of Iowa, so far as

they have been brought to our notice, that throw any light upon the present case, are the following:

In *Richmond* v. *Dubuque & Sioux City Railroad*, (1868) 26 Iowa, 191, the railroad company leased a piece of ground at its eastern terminus on the bank of the Mississippi River to an elevator company; and it was agreed between them that the elevator company should maintain an elevator building thereon, and should receive and discharge for the railroad company at certain rates, all grain brought over the railroad, shipped primarily to points beyond or other than Dubuque, and should have the handling of all such grain; and that the railroad company, during the lease, would not itself erect, or lease or grant to any other party the right to erect, a similar building in Dubuque. The railroad company, being sued on the agreement, contended that it was in contravention of sound public policy, as giving to the elevator company a monopoly of all the through grain brought over the railroad. But the Supreme Court of Iowa held the agreement to be valid, and, in the course of its opinion, said: "The elevator is mainly a means or instrumentality for loading and unloading grain into and out of cars, boats, barges or other vehicles, and, incidentally, for storing the same; it is in no just sense a connecting line of transit or connecting common carrier to the defendants' lines." 26 Iowa, 197. "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." 26 Iowa, 202.

The statute of Iowa of 1862, c. 169, § 6, (substantially reënacted in the code of 1873, § 1289,) provided that "any railroad company hereafter running or operating its road in this State, and failing to fence such roads on either or both sides thereof, against live stock running at large, at all points where said roads have the right to fence, shall be absolutely liable to the owner of any live stock injured, killed or destroyed by reason of the want of such fence or fences as aforesaid, for the value of the property so injured, killed or destroyed unless the injury complained of is occasioned by the wilful act of the

owner or his agent;" that, "in order to recover, it shall only be necessary for the owner of the property to prove the injury or destruction complained of;" and that, if the company should neglect to pay for thirty days after notice and affidavit, the owner might recover double damages. Under that statute it was held to be no defence that the stock was unlawfully running at large, if not by the wilful act of the owner or his agent. *Spence* v. *Chicago & Northwestern Railway*, (1868) 25 Iowa, 139. But where the owner of land had agreed to maintain a fence between it and the railroad, the court, while holding that persons not in privity of estate with him might still recover, said that it could not be doubted that he and his privies were estopped by his agreement to maintain an action against the company under that statute. *Warren* v. *Keokuk & Des Moines Railroad*, (1875) 41 Iowa, 484, 486.

Upon the question of the liability of a railroad corporation for damage done to the property of others by fire from its locomotive engines, in the absence of any contract between the parties, the course of legislation and decision in Iowa was as follows: Before any statute upon the subject, the corporation was held not to be liable, without proof of negligence on its part, or if the plaintiff's own negligence contributed to the loss. *Kesee* v. *Chicago & Northwestern Railroad*, (1870) 30 Iowa, 78; *Gandy* v. *Same*, (1870) 30 Iowa, 420; *McCummons* v. *Same*, (1871) 33 Iowa, 187; *Garrett* v. *Same*, (1872) 36 Iowa, 121. Thereupon the legislature amended the section above cited by adding a provision that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway; and such damage may be recovered by the party damaged, in the same manner as set forth in this section in regard to stock, except to double damages." Code of 1873, § 1289. This amendment was at first assumed to impose an absolute liability upon the corporation, independently of its negligence, and was held to be constitutional. *Rodemacher* v. *Milwaukee & St. Paul Railway*, (1875) 41 Iowa, 297. But it was afterwards settled, upon a consideration of the whole section, that the effect of the amendment was only to change the burden of proof in actions

for damages by fire; that the fact that the fire was set out or caused by operating the railway was only *prima facie* evidence of negligence on the part of the company; and that such negligence need not be alleged. *Small* v. *Chicago, Rock Island & Pacific Railroad*, (1879) 50 Iowa, 338; *Babcock* v. *Chicago & Northwestern Railway*, (1883) 62 Iowa, 593; *Seska* v. *Chicago, Milwaukee & St. Paul Railway*, (1889) 77 Iowa, 137; *Engle* v. *Same*, (1889) 77 Iowa, 661. It was also held that, by virtue of the statute, contributory negligence on the part of the plaintiff was no defence to such an action. *West* v. *Chicago & Northwestern Railway*, (1889) 77 Iowa, 654; *Engle's case*, just cited.

The Code of Iowa of 1873, in § 1308, reënacting the statute of Iowa in 1867, c. 113, provided that "no contract, receipt, rule or regulation shall exempt any corporation, engaged in transporting persons or property, by railway, from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into." That statute was rigidly enforced by the Supreme Court of Iowa in suits against railroad corporations as carriers. *Brush* v. *Sabula &c. Railroad*, (1876) 43 Iowa, 554; *McCoy* v. *Keokuk & Des Moines Railroad*, (1876) 44 Iowa, 424. But no intimation that it applied to them in any other relation was ever made by that court before the execution of the agreement in question in the case at bar.

To recapitulate: Before February 1, 1890, the date of this agreement, the Supreme Court of Iowa had declared that an elevator erected by another party by agreement with a railroad company upon the land of the latter was in no just sense a connecting line of transit, or a connecting common carrier, with the line of the railroad; and that the power of the courts to declare a contract void for being in contravention of public policy should be exercised only in cases free from doubt. That court, in 1875, when construing section 1289 of the Code of 1873, had declared that an action under the first part of that section, which makes a railroad corporation, failing to fence its road wherever it had a right to do so, absolutely liable to an action by the owner of any live stock killed or injured by

the want of such fencing, could not be maintained by an owner of adjoining land who had agreed with the railroad company to maintain the fence at the place in question. And that court had never expressed any opinion upon the effect of such an agreement as is now pleaded upon an action against a railroad company, under the latter part of that section, for damages by fire caused by the negligence of its servants in operating its railway.

After this agreement was made, and before this action was begun, a similar agreement was brought before the courts of the State of Iowa, in the case of *Griswold* v. *Illinois Central Railroad*, which arose under a contract substantially similar to that now before us, except in containing covenants by the lessee to put in immediate use and to maintain a good and substantial elevator, coal sheds and lumber yard on the premises; to ship all grain, coal and lumber that he can control by the lessor's railroad; and to "transact the business for which said buildings are erected and designed at fair and reasonable rates, and in a prompt and careful manner, so that neither the company nor the public will be prejudiced by reason of the said lessee dealing unfairly or negligently in their behalf, or in the transaction of the business connected with the grain, coal and lumber buildings so erected as aforesaid." A district court of the State having upheld the validity of the contract, and rendered judgment for the defendant, the plaintiff appealed to the Supreme Court of the State.

That court, at the first hearing, expressed an opinion that the stipulation in the contract, exempting the railroad company from liability to the lessee for damages by fire negligently set by its locomotive engines to such buildings, was void as against public policy; and among the grounds on which that opinion was placed were that the covenants just quoted, and the prospect for business which the existence and use of those buildings held out to the railroad company, "were no doubt the controlling consideration which induced it to execute the lease," and that "the lease itself fully recognizes an interest of the public in its subject-matter." 53 Northwestern Reporter, 295, 297. It does not clearly appear what that opin-

ion would have been, but for those covenants, no equivalent for which is to be found in the lease now before us.

But that court granted a rehearing, and on February 3, 1894, after further arguments, and, by a majority of the judges, reversed its former opinion, affirmed the judgment of the district court, and held the stipulation in question to be valid. 90 Iowa, 265. Its course of reasoning may be shown by quoting some passages of the opinion.

In the first place, it was said: "Public policy is variable — the very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society." So far, the opinion is in precise accord with the opinion of this court in *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, 233. The Iowa court then quoted with approval the saying of Sir George Jessel, M. R., in *Printing Co.* v. *Sampson*, L. R. 19 Eq. 462, 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

The court went on to say: "The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to property situated on the premises of its owner, where he has the right to have it, and hence the provision of section 1289 making the corporation operating the railway

absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property, the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not upon his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. They knew that the defendant corporation could only act through its officers, agents and employés, and that these might be negligent in the performance of their duties." "This is not a question whether, under section 1289, the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary; but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that, as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was." "Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable." "After a careful review of the case, we reach the conclusion that the public had no interest in the clause of the contract in question, that its enforcement works no injury to any interest of the public, and that the judgment of the district court should be affirmed."

A second petition for rehearing was then filed, and that case had not been finally decided by the Supreme Court of Iowa when the present case came before the Circuit Court of the United States at April term 1894. The Circuit Court thereupon suspended judgment in this case; and at September term 1894 — the state court having meanwhile denied the second petition for a rehearing, and thereby finally affirmed the validity of the stipulation — followed the final decision of that court, and gave judgment for the defendant. 62 Fed. Rep. 904.

The first opinion of the Supreme Court of the State of Iowa in the case of *Griswold* v. *Illinois Central Railroad* was delivered after the agreement now in question was made. The final decision in that case, reversing the former opinion, was made after repeated arguments and full consideration; was nowise inconsistent, to say the least, with the decision or the opinion of that court in any other case; and was rendered before the case at bar was decided in the Circuit Court of the United States. Under such circumstances, that decision, being upon a question of statutory and local law, was rightly followed by the Circuit Court. *Rowan* v. *Runnels*, 5 How. 134, 139; *Morgan* v. *Curtenius*, 20 How. 1; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 52; *Burgess* v. *Seligman*, 107 U. S. 20, 35; *Bauserman* v. *Blunt*, 147 U. S. 647, 653–656, and cases there cited; *Williams* v. *Eggleston*, 170 U. S. 304, 311; *Sioux City Railroad* v. *Trust Company of North America*, 173 U. S. 99; *Wade* v. *Travis County*, 174 U. S. 499.

The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is therefore affirmed.